CAADRS

CIVIL CASE MEDIATION PROGRAM
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
(WESTERN DIVISION)

INTERIM EVALUATION

Center for Analysis of Alternative Dispute Resolution Systems
November 2004

Table of Contents

Introduction

Burdened with an increasing case load and looking to maintain a high quality of justice, the U.S. District Court for the Northern District of Illinois (Western Division) established a civil case mediation program in January 2003. At that time, the Center for Analysis of Alternative Dispute Resolution Systems (CAADRS) assisted the court in creating a system for monitoring the progress of the program and evaluating its effectiveness. This system includes forms for reporting by the mediator, as well as post-mediation evaluation questionnaires for parties, attorneys, and mediators. These forms are found in Appendix B. Case filing information is retrieved from the court docket system.

This interim evaluation looks at the progress of the program through its first year. Examined in this study are the number of cases referred to mediation and the number mediated; the percentage of mediated cases ending in agreement; the types of cases being mediated; and the experience of parties, attorneys, and mediators with their mediations.

Analysis shows that through the first year, the program was successful in resolving cases in mediation, although participation in the program has been lower than anticipated, and certainly lower than would be optimal. Response to the program and to the mediators by those who have participated in mediation, however, has been very positive.

The Court

The Western Division of the U.S. District Court for the Northern District of Illinois is administered by a District Judge and a Magistrate Judge. The judges have always encouraged settlement, and the magistrate judge has been especially active in this process through the facilitation of settlement conferences. The practice in the court has been to encourage the use of settlement conference prior to summary judgment and to mandate it after summary judgment.

Civil Cases Filed in the Western Division	
2000	460
2001	481
2002	509
2003	556

As case filings increased over the years to more than 500 in 2002, the judges became interested in instituting a pilot mediation program to assist in resolving cases. The goal was to free up the magistrate's time by having cases resolve through mediation rather than through settlement conference, as well as removing cases from the docket more quickly by getting the parties to engage in settlement discussions sooner, thus saving the litigants time and money. Additionally, the court saw mediation as a "potentially more satisfying" alternative to litigation that would not impair the quality of justice provided to litigants.

The Program Development Process

In order to ensure that the mediation program would meet the needs of those who used it and to increase acceptance of the program by the bar, the court decided to name a committee to develop the rules and procedures for the program. The committee included both judges, approximately 30 attorneys with extensive practice in the Federal Court, and members of CAADRS' Executive Committee and staff.

Through a year-long process, the committee wrote the rules and developed the procedures for the program, worked with the court on the informational brochure that would be distributed to the attorneys involved in all eligible cases, and developed qualification criteria for mediators to be placed on the court's roster.

The Program

By court rule (see Appendix A), cases eligible for mediation through the program are all civil actions except those involving *pro se* litigants, mortgage foreclosures, Social Security, prisoner civil rights, and bankruptcy appeals. Participation in the program is largely voluntary. The Court may order cases to mediation; however, parties may move to be relieved from this requirement. In practice, cases are not referred to mediation if the parties do not believe mediation to be appropriate.

The program was set up to be flexible for both the parties and the court, but to encourage mediation early in the case. According to the Commentary to the ADR Local Rules, "[t]hese Rules are intended to reflect the consensus of the committee and the Court that mediation become part of the case management process and that, like the case management process, there be flexibility in the use of Court annexed alternative dispute resolution. It is the intent of these Rules that the Court, working with the parties may refer cases to mediation at any time prior to trial, but most frequently, at the time of entry of the case management order."

Parties are free to choose any mediator, although the court maintains a roster of approved mediators. Mediators on the roster must be experienced with civil litigation in the federal court, and fulfill specified criteria as discussed below. Parties and the mediators negotiate the fee paid the mediators. The parties also negotiate the percentage each pays the mediator. The rule authorizes mediators to charge reasonable fees for preparation time as well as time spent in mediation.

The Process

At the time of filing, all attorneys receive a packet of information regarding mediation, including the ADR Local Rules and a pamphlet that outlines the benefits of ADR and describes the processes sponsored by the court, including mediation. The attorneys are expected to use this information to discuss the ADR options with their clients.

Pursuant to ADR Local Rule 2-3, cases may be referred to the mediation program by agreement of the parties or by the court at the time of entry of the Case Management Order, which generally occurs within 60 to 90 days after case filing. If a case is not referred at the time of the entry of the Case Management Order, the case may be referred at any time prior to trial. Any party whose case has been ordered to mediation may file a motion for relief from the order within 10 days of the ordered referral.

ADR Local Rule 3-1 states that at the initial case management conference, counsel is "expected to" report to the court on whether agreement on the court-referred mediation has been reached and whether a mediator has been selected. If the parties are unable to agree on a mediator, the Court shall assist in the selection of a mediator from the court roster. At the time of the writing of this evaluation, all mediators had been selected by the parties.

Once the case has been referred, the mediation is to be completed within 60 days, although extensions can be granted upon motion by one or both parties. The 60 day limit was put in place in order to ensure that the case moved forward at a reasonable pace even with the referral to mediation. It is up to the discretion of the judge as to whether discovery is stayed or continues during the mediation process; however, in practice discovery is generally stayed.

No later than 10 days before the mediation session, each party is required to submit to the mediator a Mediation Statement providing the names of those with decision-making authority, who will attend, and those whose presence at mediation would be useful; the substance of the suit, including the party's views of the key liability issues and damages; the discovery or motions that will most likely contribute most to equipping the parties for meaningful settlement negotiations; the history and current status of any settlement negotiations; and copies of documents likely to make the mediation more productive.

Attendance at mediation is required for all named parties and their counsel. Corporate or other entities need to be represented by a person with decision-making authority. Insurer representatives are required to attend as well. The Rule states that the "mediation shall be informal" and give mediators the discretion to structure the mediation to best fit the situation.

ADR Local Rule 4-11 permits the mediator and parties to decide whether further sessions would be beneficial should settlement not result from the first session. Further, the mediator may stay involved in the case following mediation, up to the time of trial, in order to continue to attempt to facilitate resolution.

Reporting on the mediation is the mediator's responsibility. ADR Local Rule 4-12 requires mediators to submit a "Certification of Session" to the ADR Unit within ten days after each mediation session has been completed. This report includes the date the session was held, whether the case settled in full or in part, whether any follow-up is scheduled, and any stipulations the parties agree may be disclosed. The Certification of Session is filed with the Clerk by the ADR Unit.

If agreement is reached, the Rule requires the mediator to help the parties draft a settlement agreement and a stipulation and proposed order to dismiss, which will be filed with the court within ten days of settlement.

Methodology of the Study

The first goal of this evaluation is to examine the functioning of the program to see if it is operating as designed, and then to determine if any changes need to be made in order to improve how the program functions. The second goal is to examine the outcomes of the program to see what impact, if any, it is having on the participants and the court, and particularly if it is having the desired effect.

This evaluation examined cases referred to mediation from the start of the program on January 3, 2003 to December 31, 2003, the end of the program's first year. However, the first case was referred on February 7, 2003, and certain cases referred in 2003 were mediated in 2004.

The evaluation relied upon three sources of data: mediator Certifications of Session filed after each mediation session; court docket information; and evaluation questionnaires submitted by attorneys, litigants, and mediators. During the period of study, mediators filed 26 Certifications of Session and returned 23 evaluation questionnaires, and attorneys returned 26 of their own evaluations and 12 evaluations completed by their clients.

It should be noted that evaluation questionnaires were returned on a voluntary basis. Because of this, the findings regarding attorney and litigant reaction to the program may not be representative of all those who have participated in the program. This is particularly true of the litigants, whose return rate was very low.

Program Functioning

Referrals to Mediation

In 2003, 46 cases were referred to mediation. These included three cases that were in the system for 5 years or more, 14 cases in the system 2 to 4 years, and 19 cases from 2002. Ten of these were cases filed in 2003.

It was decided that the referral rate should be calculated by determining what percent of cases filed in 2003 were referred. This would provide data that would most accurately reflect the referrals of new cases to mediation. Only those cases filed in 2003 could follow the program completely from the mailing of information packets at the time of filing to the consideration of mediation prior to the Case Management Order. The most important consideration, however, was that the percentage of new cases referred to mediation would best predict the continued rate of referral for the program.

To calculate the referral rate for cases filed in 2003, referrals were tracked through June 2004. This added four more referrals to those made in 2003, for a total of 14 referrals for 2003 cases These 14 are approximately 7% of all eligible cases filed that year.[1] This is much lower than the 25% referral rate for new cases that was expected when the program was established.[2]

Of the 46 cases that were referred to mediation in the first year of the program, 31 were mediated in 2003. Of those cases that were referred but not mediated, 4 were mediated in 2004, one settled prior to mediation, two eventually settled without mediation, and one was closed through summary judgment. The other eight did not schedule mediation and the cases are still open.

As intended by the court, the timing of referral was relatively early for cases filed in 2003. Of the 14 cases filed in 2003 and referred by June 2004, all but four were referred to mediation within six

[1] The exact number of pro se cases (which are ineligible for mediation) is not known. The referral rate is therefore approximated from three sources in order to ensure that the estimate given was valid: the clerk's estimate of the percentage of cases that were eligible, the clerk's estimate of the percentage of cases that were pro se, and the percentage of eligible cases identified from a random sample of 75 cases filed in 2003. All three sources pointed to approximately 35%, or 195, being eligible for mediation. This led to the calculation of a 7.18% referral rate, which was rounded to 7%

[2] Practically speaking, the 46 total referrals represent about 24% of the eligible cases filed in 2003. However, it is believed that many of the older cases that would benefit from mediation have been identified and this source of referrals will diminish in the future.

months of case filing. All four cases that were filed in late 2002 and referred to mediation were referred within that same amount of time. However, due to the youth of the program, analysis of referrals through 2004 will be necessary to determine whether this trend of referrals taking place in the first few months of a case is general practice.

Mediated Cases

Five of the 31 cases that were known to have been mediated in 2003 did not have Certifications of Session filed. The rest of this report will look at the remaining 26 cases.

Seven of the 26 cases for which Certifications of Session were filed involved employment civil rights; another seven were personal injury cases. There were four mediations each of civil rights and contract cases, two of patent cases, one of a case involving a federal question, and one involving property damage.

Case Types Mediated	
Employment Civil Rights	7
Personal Injury	7
Civil Rights	4
Contract	4
Patent	2
Other	2

The mediations were conducted by 10 mediators. Of these mediators, one mediated five cases, three mediated four cases, one mediated three cases, and one mediated two cases. Another four mediated one case each.

Timeliness of mediation

By court rule, mediations should be held within 60 days of the case management order sending the case to mediation. This time period is set in order to ensure that the case continues to move forward even with an order to mediate. For half of the cases this deadline was met, and almost all mediated within three months. ***For the 26 cases, the average number of days that elapsed between referral and the first mediation session was 63.92.*** The range is between 16 days and 161 days. Of the 26 cases, 13 fulfilled the requirement of mediating within 60 days of the case management order. All but two cases were mediated within 93 days of the case management order – or within about three months of being sent to mediate. As discovery is generally stayed during the mediation process, the ability to mediate the case as soon as possible after the referral is made is particularly important to the overall efficiency of case management.

Efficiency can also be noted in the amount of time it takes for a case to move from filing to disposition. The time from case filing to close for cases filed in 2003 and settled in mediation ranged from 178 days to 359 days. The two cases that did not settle in mediation were still open as of mid-October, 2004. This data is given solely to note that the trend is cases settled in mediation to reach closure in six months to a year. There is too little data to draw any conclusions. There is also too little data to make any comparisons with non-mediated cases at this time, although this is something that should be done in the future.

The Mediators

In an effort to ensure high quality services, the court maintains a panel of mediators whose applications have been accepted by the court. Mediators on the panel are to be attorneys who have been admitted to the bar of the U.S. District Court for the Northern District, retired judges, or on the faculty of an accredited law school. The court does accept the applications of mediators who are not lawyers, provided they have the appropriate professional credentials. All mediators must be

knowledgeable about civil litigation in federal court. In addition, they must complete mediator training as required by the court, have practiced law for at least 7 years, be knowledgeable about civil litigation in federal court, and familiar with the field of law of the case they are mediating.

There are currently 44 mediators on the court's roster. Information on these mediators, including copies of their applications, is found on the court's web site (www.ilnd.uscourts.gov). These mediators were required to attend a three-day training in basic mediation skills, with the exception those who already had significant mediation experience and retired judges.

Of the ten mediators who conducted mediations in 2003, all but one are experienced lawyers with between 18 and 30 years of experience practicing law. One is a retired judge with 45 years of law behind him. All but two had experience mediating prior to the onset of the program, with 5 to 15 years of mediation experience and 4 to 600 mediations already conducted. Training ranged from 16 to 41 hours, with the exception of the retired judge, who reported no official mediation training. However, most of these mediators had attended between 16 and 24 hours of training. Areas of expertise cited by these mediators were mainly business, commercial, personal injury, and employment discrimination.

It appears from this data that the mediators who have been selected to mediate do by and large have the experience and expertise that the court envisioned when the program was developed.

Mediator Styles

Mediators utilize a range of styles and techniques in mediation. In civil cases, they most often use techniques referred to as facilitative and evaluative. Facilitative techniques focus on the needs and interests of the parties, while fostering better communication and understanding between them. Evaluative methods look to assess the legal and practical issues involved, often evaluating the merits of each party's arguments and providing input as to the possible outcome of the case.

Local Rule 2-4(b) specifies that mediators have "strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations." Under this Rule as well, mediators are also expected to have "sufficient experience and familiarity with the field of law in which they are serving so as to provide the parties with credible evaluation and assessment of their relative positions." From this, it is apparent that the court is interested in mediators using both facilitative and evaluative techniques.

The mediators approved by the court were asked to describe their mediation styles in their applications to be placed on the roster. Of the ten who have mediated cases in the program, eight answered this question. These eight wrote of focusing on evaluating the strengths and weaknesses of each side, and saw the goal of mediation as settling the case. Three mentioned using facilitative methods along with evaluative techniques.

Self-reporting on mediator evaluation forms reinforces the notion that the mediations being conducted in the program are more evaluative than facilitative. In all but one mediation, the mediators reported that they focused on the legally relevant issues and that they focused on the evidence in the case. In all mediations they reported helping parties to determine the strengths and weaknesses of their case. On the other hand, the more facilitative actions were less often taken. In

12 of the 22 mediations, the mediators reported giving primacy to the parties' needs and interests. In ten of 22 mediations, they reported helping the parties to generate their own options.

Current thinking in the field extols the benefits of the use of a combination of evaluative and facilitative techniques in mediation. The court's own interest in having both in use is therefore encouraging. The court should be aware of the possibility of mediators moving more toward a fully evaluative style, leading to possible loss of self-determination, one of the core principles of mediation. Under the Model Standards of Conduct for Mediators, the first principle is self-determination, where it is stated: "The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options."[3]

Reporting

By court rule, the mediator must complete Certification of Sessions at the end of each mediation session and return it to the court (see Appendix B). These certifications contain information on the outcome of the mediation, the amount of time spent in mediation and in preparation to mediate, who attended, and the percentage of mediation conducted in person, by phone, and via email. Additionally, mediators are asked to complete evaluation questionnaires. The court also requests that attorneys complete and return evaluation questionnaires at the end of mediation, as well as return evaluation questionnaires completed by their clients. The Certification of Session is to be returned to the Clerk's Office. The other forms are to be returned to the magistrate judge's office.

Relatively speaking, this part of the program is functioning somewhat well. The mediators are doing their part, supplying 26 of 31 certification of sessions and 23 of 31 evaluation forms. However only 25 of a minimum 56 attorney evaluations were returned. The evaluation questionnaires for the parties were returned at an even lower rate, with only 12 being returned. Because it is only through the return of these forms that the court can fully know how well the mediation program is functioning, a higher return rate is essential to ensuring the quality of the program.

Outcomes

Resolution Rate

Of the 26 cases for which information has been collected, 10 settled in full at the time of the mediation and another settled after mediation. One other case settled in part, while 12 did not settle. One case was continued and then never mediated, and another's outcome was unknown. Dropping these last two cases, this means that in 2003, 50% of the cases mediated ended in full or partial settlement. This is normal for new programs: in general, civil case mediation programs have resolution rates between 40% and 60% in their first year.

Outcome of Mediations	
Settled	12
Partly Settled	1
Not Settled	13

[3] The Model Standards of Conduct are the product of a joint effort between the American Bar Association, the Association for Conflict Resolution, and the American Arbitration Association. The Standards can be found at http://www.abanet.org/dispute/webpolicy.html#8.

Between December 31, 2003, and September 30, 2004, another ten cases were mediated (eight settled in full, two did not settle). Including those cases, 58.3% of mediations ended in full or partial settlement.

The most common reason for cases not settling given by mediators, attorneys, and litigants, was that at least one party had unreasonable or unrealistic expectations of the outcome of the case. Mediators also noted differing positions and intransigence, along with three more structural reasons: in one case, the mediator stated that one party was interested in achieving a change in the law; in another, the insurance representative did not participate; and in a third, the mediator reported the case was referred too soon – before the parties had enough knowledge of each other's case to "digest the impact of the facts on the case."

In addition to unreasonable expectations by the other party, attorneys placed responsibility for the lack of settlement on the parties being too far apart, an attorney who was not knowledgeable, and the insurance representative not participating. These last two were noted for one case each. Litigant assessments reflected the same ideas.

Efficiency

The amount of time spent in mediation is an important item in determining how well the program is serving the litigants as it directly relates to the amount of money spent in the process. ***The amount of time spent in mediation varied between 1 hour and 15 hours, with an average of 4.33 hours.*** All mediations but one were completed in one session. The 15-hour mediation was completed in two sessions and did not result in a resolution. While it is too early to tell, it does appear that cases that settle in mediation do so after a greater length of time in session: they average 5.22 hours in mediation, in comparison to an average of 3.81 for those cases that did not settle in mediation. Given that the mediator's hourly rates ranged from $175 to $250 per hour (except for one mediator who noted an hourly rate of $600),this means that parties to those cases that do not settle tend not to expend significant amounts of time or money in the process, and those that do settle are generally doing so efficiently.

The amount of time mediators spent preparing for individual mediations ranged from 0 to 10 hours, and averaged 2.24. There was no difference in average number of hours of preparation for those cases that settled in mediation and those that did not.

Attorney perceptions of the efficiency of mediation depended on what was being considered. Most attorneys viewed mediation as reducing time to disposition. Of the 23 attorney responses to this question, 14 (61%) agreed that mediation led to earlier resolution, while only two (9%) agreed it would increase time to resolution.

Attorney Views on Time to Disposition		
Reduced	14	61%
No effect	7	30%
Increased	2	9%

Attorneys were less optimistic about costs, with 13 (54%) of 24 believing that mediation would lead to cost savings, and eight (33%) believing it would increase their clients' costs. All of those who thought mediation would lead to increased time or costs participated in mediations in which agreement was not reached.

Attorney responses correlated with whether settlement was reached. Only one attorney in a mediation not reaching agreement believed that time and costs would be reduced. However, only two believed mediation would lead to greater time to case closure. The other six believed it would have no impact. Eight of eleven attorneys who participated in mediations that did not end in settlement believed that mediation was increasing their clients' costs, two believed it would have no impact, and one believed it would reduce costs.

On the other hand, of those whose cases resolved in mediation, eleven believed that time to closure would be reduced, one believed it would have no impact, and none believed it would increase time to closure. Similarly, ten believed participating in mediation reduced their clients' costs, while one thought it had no impact. None saw it as an additional financial burden.

The efficiency of mediation was also noted by the litigants. All but one thought the mediation sessions were the right length of time. Seven of 10 respondents thought that mediation would lead to the early resolution of the case; only one thought it would increase the time to resolution. Not surprisingly, the parties had the exact same response to the cost – seven thought mediation would reduce the cost of litigation; only one through it would increase their costs.

Satisfaction

Overall satisfaction of attorneys, litigants, and mediators with their experience with the program was high, even when the case did not resolve in mediation.

Attorneys

The attorneys who submitted post-mediation questionnaires were overwhelmingly satisfied with their experience with mediation and the mediators. In broad terms, 20 of 24 (or 83%) strongly agreed (11) or agreed (9) with the statement that they were satisfied with the process of mediation. They also generally believed that mediation was helpful to the resolution of the case. Eighteen of 25 (or 72%) stated that mediation was very helpful (11) or somewhat helpful (7). Only one response noted that mediation was detrimental to the resolution of the case.

Attorney Satisfaction with the Mediation Process		
Satisfied	20	83%
Neutral	1	4%
Dissatisfied	3	13%

In response to the question of whether they would use mediation again, all but one of the 25 attorneys said yes. Those who provided feedback as to why they would use mediation again most often stated that mediation was effective. Others stated that it was cost effective, led to early resolution, and that it put the client in charge. The one attorney who would not use mediation again owned to not being "a fan" of the process.

The attorneys were very positive in their assessment of the performance of the mediators. Of the 25 who responded, 23 agreed that the mediator was well-prepared, an equal number believed that the mediator helped the parties generate options, and 24 believed the mediator was knowledgeable about the law in the case. Most (20 of 22) also believed the mediator helped the

parties move toward settlement. Just as important, 6 of the 11 attorneys whose cases did not settle in mediation felt that the mediator helped move the parties toward settlement.

Not surprisingly, all attorneys stated they would use that particular mediator again. In comments as to why they would, they generally noted the mediators' skills and knowledge, with two noting the mediator's fairness. Comments included:

- "[The mediator] quickly assessed how to handle the plaintiff to negotiate a settlement."
- "[The mediator] has a strong litigation background that allowed him to assess the case well and gave us and our clients confidence in him."
- "The mediator did the one thing that was probably the critical fact that allowed resolution - took the time to listen to the plaintiff."
- "[The mediator] is very fair, courteous, prepared and an enthusiastic mediator."

One attorney noted that the mediator was "knowledgeable, competent, and fair", but that he/she would have liked the mediator to be more forceful with both parties in getting a settlement. There were no other critical comments.

Litigants

The litigants, too, were satisfied with their experience in mediation. Of the 12 who completed post-mediation questionnaires, all would use mediation again. Ten (83%) either strongly agreed (5) or agreed (5) that they were satisfied with the process. Ten of the twelve also strongly agreed that the process was fair; one simply agreed with that statement. Interestingly, two of the three who stated mediation was detrimental to the resolution of the case participated in cases that settled in mediation.

Litigant Assessment of Mediation Helpfulness		
Helpful	6	55%
No impact	2	18%
Detrimental	3	27%

On the less positive side, only 5 of the 11 litigants who responded felt satisfied with what was accomplished in mediation. Three of those who reached agreement in mediation were neutral and three were dissatisfied with what was accomplished. Six of 11 believed that mediation was very helpful to the resolution of the case, while three believed it to be detrimental. Another two felt it had no impact. Of those eight who reached agreement, four (50%) agreed they were satisfied with the agreement, three were neutral in their response, and one strongly disagreed with the statement that they were satisfied with the agreement. All of the litigants, however, would use mediation again. Only one stated why – "Mediator did excellent job looking at probabilities and involving all parties in evaluating merits of case."

The litigants were very positive in their assessment of the mediators. All agreed that the mediator was well-prepared. All felt that they were allowed to present their case. All but one felt the mediator carefully listened to them. All believed the mediator was unbiased, and all would use that particular mediator again. Only three litigants followed up their responses with comments. These were all positive:

- "Mediator gave great insight and resolved case for less than defense fees had it gone to court."
- "Did a good job and tried hard."
- "Knowledgeable about the law and this case."

It is important to note that due to the small number of litigation questionnaires received, these findings cannot be extended to the entire population of litigants who participated in mediation. The responses can only reflect the perceptions of those who returned the questionnaires.

Mediators

The mediators were also positive about the mediations they conducted. Evaluations were returned for 23 of the 26 mediations conducted.

The mediators generally felt that the court was doing a good job in referring cases. In 22 (96%) of the 23 cases, the mediators believed that the case was appropriate for mediation. In one other, the mediator was neutral as to the appropriateness of the case for mediation. In that case, the mediator stated that the parties had no middle ground, with each party maintaining their position that they could not lose. In 19 (83%) of the 23 cases, the mediators agreed with the statement that the case was referred at the right time. Two mediators disagreed with that statement. However, in one of those cases, the mediation resulted in agreement. In both cases, the referral to mediation occurred within three months of the filing of the case.

Mediators' assessment of the lawyers was also generally positive. In 20 cases (87%), the mediators reported the lawyers were prepared for the mediation. In fourteen cases, the mediators reported that the litigants were prepared for mediation. Less positively, in five cases (22%), the mediators reported that the litigants were not prepared. This reflects on the lawyers because it is their responsibility to ensure that their clients are prepared. Similarly, attorneys play a large role in encouraging or discouraging the involvement of the parties in mediation. In 18 (78%) of the cases, mediators agreed that the parties were actively involved in the mediation. In two, the mediators strongly disagreed with that statement.

The mediators were clear in their belief that mediation was helpful to the resolution of the case. In 18 cases (78%), the mediators stated that the mediation was very helpful (11) or helpful (7) to the resolution of the case. In no case did the mediators state that it was detrimental. The mediators also tended to see mediation as leading to an early resolution of the case, and to decreased costs. In 15 (65%) of the 23 cases, the mediators believed that the mediation would lead to an earlier resolution of the case; in 16 they saw mediation as leading to lower litigation costs.

Recommendations

The mediation program in the U.S. District Court for the Northern District is off to a respectable start. It appears that generally the mediators who have been selected to mediate cases through the program have significant experience in both law and mediation. The settlement rate is at the level of most programs when first starting out. Both attorneys and parties have reported a high rate of satisfaction with the program and with the mediators, and the mediators have been positive as well.

There are areas of weakness, however. The most important of these is the number of referrals to mediation. The other two areas of weakness are the preparation of the parties by their counsel and, to a lesser degree, reporting on the program. The following recommendations focus on improving these areas.

1. Develop a more robust referral process

As noted above, only about 7% of eligible cases filed in 2003 were referred to mediation. If the court wants to achieve the goal of reducing the judges' caseload, this number needs to be increased. However, this very low percentage should be viewed in the context of this particular court. It can be explained partially by the fact that mediation is a replacement for judicial settlement conferences conducted free of charge by a magistrate judge experienced in facilitating settlement. Prior to the institution of the mediation program, all cases were urged to participate in a settlement conference with the magistrate judge. The only change in that policy is that now the parties can choose between mediation and judicial settlement conference. As the Commentary to the Local Rules states, "[n]othing in these Rules is intended to limit the Court's ability to conduct settlement conferences pursuant to Fed. R. Civ. P. 16."

Because use of court mediation tends to be low in voluntary programs, debate has been ongoing within the field of court ADR as to whether to mandate participation in mediation or not. It was clearly the intent of the committee that developed the mediation program that mediation be voluntary, as noted in the Commentary to the ADR Local Rules. While mandatory mediation would increase the number of cases referred to mediation, leading to lower caseloads for the judges, it is not recommended at this time for the court to change the essential character of the program. To do this would require that the court go back and re-establish the organizing committee to consider how a mandatory program would work and to develop the necessary support for that program approach. Therefore, mediation should remain voluntary despite the low referral rate. There are a few things the court can do, however, to increase the number of cases being mediated.

<u>Increase the use of mediation for employment discrimination cases</u>.

There were 35 eligible employment discrimination cases filed in the Western Division in 2003, making up 26% of all eligible cases filed. Only four of those cases were referred before July 2004, and only three were mediated. During the planning process, the court had considered the mediation of these cases to be central to program functioning. Many of these cases have relatively low monetary values, which make them particularly appropriate for early referral to mediation, before the high cost of discovery.

Additional evidence of the appropriateness of these cases for mediation is the success of the mediation programs run by the Equal Employment Opportunity Commission and the Illinois Department of Human Rights. These programs demonstrate that employment discrimination cases can benefit greatly from mediation. Furthermore, data from the Eastern Division indicates that 45% of all cases settled in conferences with magistrate judges involve employment discrimination. Twenty percent of those settle with little or no discovery completed.

While mandating mediation for employment discrimination cases is not recommended for the reasons stated above, the court should work with lawyers in the field to enhance the use of mediation for these cases. To address the mediation of this particular group of cases, the court should consider gathering attorneys who work in the field to discuss the topic. In particular, the attorneys' own and their clients' reservations about mediation should be addressed. Gatherings might include a brown bag lunch or a bar association meeting, and should be led by employment discrimination attorneys and mediators with a good amount of experience mediating these cases.

Sponsor Advocacy Training for Lawyers

Achieving a greater number of referrals requires greater acceptance by attorneys of the process of mediation. This, in turn, requires educating attorneys not just about the benefits of ADR, but in the skills required to be good advocates in mediation. This is the conclusion derived from at least two surveys of attorneys regarding their use of mediation. The surveys indicated that those attorneys who felt comfortable with mediation and with their own skill level as advocates in the process were more likely to counsel their clients to try it. This correlated in part with their previous training in mediation.[4]

Advocacy training for lawyers would assist in both achieving a greater number of referrals and making mediation sessions more effective and – possibly – more efficient. Most of the lawyers who returned their evaluation forms noted that they were inexperienced with mediation. Less than half of 27 reported they had more than a few mediations under their belt prior to the current mediation, and six had no experience at all. These attorneys, therefore, would benefit from training in mediation advocacy.

Currently, the court looks to the lawyers to determine when mediation would be most appropriate for their case. Although the judges may prod the parties, they act with the notion that the lawyers have the best idea of whether they have the information they need to negotiate settlement. While there is some truth to that, research has shown that lawyers tend to believe they need to complete much of their discovery before they can mediate their case, [5] while other data points to the probability of settlement of many cases before much discovery is done. [6] Early mediation is also more likely to lead to cost and time savings to both the court and the litigants. Thus, training lawyers regarding the timing of mediation, the amount of discovery needed, and the identification of proper cases for mediation is essential to a well-functioning program.

It is recommended that the court work with the local or state bar association to sponsor a training on mediation advocacy. The training should be conducted by professionals experienced in mediation advocacy.

More strongly encourage attorneys to use mediation

Research has shown that clients do not independently suggest the use of mediation for their case. They generally follow the advice of their counsel.[7] The surveys discussed above found that the single greatest factor in getting attorneys to encourage their clients to use mediation was the attorneys' own previous participation in mediation as counsel. While the number of attorneys practicing in the Western Division who have significant experience as advocates in mediation is not known, as noted above, at least half of the attorneys who have participated in the mediation program have had minimal experience with mediation. One way to increase referrals at the outset of the program is for the judges to be more forceful in promoting mediation in individual cases that

---

[4] *See,* R. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459 (2004); and R. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations,* 2 PEPP. DISP. RESOL. L.J. 199 (2002).

[5] *See*, for example, B. McAdoo, *The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 1997.

[6] For example, in the Eastern Division of the Northern District of Illinois, settlement conference data shows that 20% of cases that settle do so with little or no discovery completed.

[7] *See,* Wissler (2002), supra note 4, at 204.

they believe would particularly benefit from the process. Once mediation is in wider use, the judges can rely again on the attorneys' perceptions of their cases if they so choose.

2. Enhance attorney preparation of their clients
As noted above, mediators in 5 of 26 cases stated that the litigants were not prepared for mediation. The reason for their lack of preparation is not known; however, responsibility for their preparation lies with their attorneys. Advocacy training would serve to give the lawyers a greater understanding of their responsibility to prepare their clients for mediation and to assist attorneys in educating their clients about the process. Advocacy training, as recommended above, is also recommended for this purpose.

3. Improve reporting to the court
All information regarding the mediations conducted through the mediation program comes from the participants themselves. The mediators provide the most basic information – the date of mediation, the outcome, and who attended. Beyond that, the court relies on voluntary submission of evaluation questionnaires to get input from participants as to their perception of the quality of justice they received through the mediation process. It is only through these forms that the court can identify possible areas for improvement of the mediations themselves. It is therefore essential that the court have a well-functioning data collection system.

As stated above, the court has done a respectable job in collecting mediator certifications of session, with 26 of 31 received. However, good management requires that the court receive information on *all* mediated cases. The court has begun to follow up with the mediators from whom no certification of session has been received. This process should continue. The court should also consider negative repercussions for those mediators who do not report as they should. One such repercussion to consider would be dismissal from the roster for non-compliance with the ADR Local Rules.

The court is also helped by monitoring the quality of justice being provided through the mediation program. This requires return of evaluation questionnaires from the participants. The court is collecting fewer of these than the certification of sessions. The court should follow up with attorneys as to whether they have returned the evaluation questionnaires, strongly encouraging them to do so.

Other Recommendations
Aside from addressing the weaknesses in the program, there are other steps the court can take to ensure the program continues to provide a high quality of justice. These include the following:

<u>Offer pro se clients the opportunity to mediate</u>.
Currently, the court excludes pro se cases from the mediation program because of the belief that an unrepresented litigant is at a disadvantage in negotiations. However, access to justice is a necessity for all parties. Pro se cases make up 30% of all employment discrimination cases, making them another appropriate group of cases for mediation. Additionally, pro se litigants should be afforded the same opportunities as others.

There are two ways the court can provide mediation to pro se clients. One would be to look into the possibility of lawyers assisting pro se parties in mediation on a pro bono basis. The court might

work with Northern Illinois University College of Law's legal clinic to provide that assistance. The court should be cautioned, however, that such attorneys should understand the mediation process and the role of attorneys in that process. The other options would be for the court to have the mediators be trained in how to work with pro se parties. Pro se parties would then have access to mediation without representation.

Continue to monitor the essential elements of the program

For the mediation program to operate effectively and efficiently, it is important that the quality of the mediators and their actions remains high, mediation is scheduled relatively quickly, and the experience of the participants is one of fairness, competence, and efficiency. Thus far, the program is doing well in all these aspects. It is important, however, that the court continue to monitor these factors to identify any issues that may arise.

Conclusion

If a mediation program's success is measured by its timeliness, cost-savings, participant satisfaction, and use, then during the first year, the mediation program in the Western Division has been successful. The resolution rate for the cases that mediated is on target for new programs, and satisfaction with the process, program, and mediators was high for both attorneys and parties.

The biggest obstacle the program must overcome is the low referral rate. While the low number of referrals can be explained to a certain extent by the fact that mediation is seen as replacing free settlement conferences by an experienced and capable judge, a 7% referral rate is still quite low. This referral rate has declined in the second year of the program – as of November 1, 22 cases had been referred in 2004, and only 6 of those were cases filed in 2004. If the number of referrals from current cases is not increased the mediation program will have very limited impact.

APPENDIX A

TABLE OF CONTENTS
LOCAL RULES
FOR
ALTERNATIVE DISPUTE RESOLUTION MEDIATION

Page

LOCAL RULES
FOR
ALTERNATIVE DISPUTE RESOLUTION MEDIATION

1. PURPOSE AND SCOPE OF RULES

1-1. Title.

These are the Local Rules for Alternative Dispute Resolution Mediation in the United States District Court for the Northern District of Illinois, Western Division. They should be referred to as "ADR L.R. _____."

1-2. Purpose and Scope.

(a) Purpose. The Court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods. The Court also recognizes that sometimes an alternative dispute resolution procedure can improve the quality of justice by improving the parties' clarity of understanding of their case, their access to evidence, and their satisfaction with the process and result. The Court adopts these ADR Local Rules to make available to litigants a court-sponsored ADR mediation process to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice or the right to trial.

Commentary

The Alternative Dispute Resolution Act of 1998, 28 U.S.C. Sections 651-658, requires each federal district court to authorize by local rule the use of at least one ADR process in all civil actions. In accordance with § 651(c), the Court has examined the effectiveness of its ADR programs and has adopted improvements consistent with the Act.

(b) Scope. These ADR Local Rules are effective _____, 2002 and shall govern actions pending or commenced on or after that date. These rules supplement the Civil Local Rules of the Court and, except as otherwise indicated, apply to appropriate original civil actions as determined by the Court with the aid of the parties, but not including actions involving *pro se* litigants, mortgage foreclosures, social security, prisoner civil rights, and bankruptcy appeals.

2. GENERAL PROVISIONS

2-1. ADR Unit.

(a) Staff and Responsibilities. Reserved.

2-2. ADR Magistrate Judge.

The Judges of the Western Division will designate a United States Magistrate Judge as the ADR Magistrate Judge. The ADR Magistrate Judge is responsible for overseeing the ADR Unit, consulting with the ADR Director and ADR Program Counsel on matters of policy, program design and evaluation, education, training and administration. The ADR Magistrate Judge shall rule on all requests to be excused from appearing in person at mediation sessions, and shall hear and determine all complaints alleging violations of these ADR Local Rules. When necessary, the District Judge for the Western Division, to whom the case is assigned, will perform, temporarily, the duties of the ADR Magistrate Judge. When the term "court" or "judge" appears in the balance of these rules, the term includes the ADR Magistrate Judge.

2-3. Referral to ADR Mediation Program.

(a) Referral. Cases may be referred to the Court's mediation program by agreement of the parties or by the Court at the time of entry of the Case Management Order as ordered by the Court pursuant to Civil Local Rule 26.1. The Case Management Order entered by the Court will note when a case has been referred to mediation. The Case Management Order shall also specify the time frame in which the ADR process will be completed. The court may stay discovery for a reasonable period of time to facilitate the mediation process. A case not referred to mediation at the time of entry of the Case Management Order may be referred to mediation at any time prior to trial by agreement of the parties or by order of the Court.

The Court, in considering whether a case is appropriate for referral to mediation, shall consider the likelihood that mediation will be beneficial, the burden imposed on the parties by mediation, the additional cost to the parties, and the recommendations of the parties. If the Judge at the case management conference determines that mediation is not likely to deliver benefits to the parties sufficient to justify the resources consumed by its use, the Judge will exempt the case from participating in any ADR process.

Commentary

The committee on the Pilot Mediation Program for the U.S. District Court for the Northern District of Illinois, Western Division, relied heavily on the Local Rules

governing Alternative Dispute Resolution from the U.S. District Court for the Northern District of California. Those Rules allow for automatic referral of cases to non-binding arbitration and early neutral evaluation as well as mediation. The committee recommended to the court that non-binding arbitration and early neutral evaluation not be court annexed alternatives in the Western Division.

Regarding early neutral evaluation, the recommendation of the committee was based on the impression that early neutral evaluation appeared, under the Northern District of California Local Rules, to offer no more than mediation and to lack the resolution oriented approach of mediation. It is assumed, however, that mediators, although neutrals, will not only act to facilitate compromise but will be willing and able to offer litigants frank and confidential third-party assessments of their relative positions and risks.

Moreover, non-binding arbitration was viewed by the committee as inflexible and ineffective. The members of the committee were practitioners familiar with the Illinois state courts' system of mandatory non-binding arbitration. Most committee members, both of the plaintiffs' and defendants' bars, reflected that non-binding arbitration adds a layer of expense in preparing for the arbitration because many arbitration awards (approximately 44%) are rejected.

These Rules are intended to reflect the consensus of the committee and the Court that mediation become part of the case management process and that, like the case management process, there be flexibility in the use of Court annexed alternative dispute resolution. It is the intent of these Rules that the Court, working with the parties, may refer cases to mediation at any time prior to trial, but most frequently, at the time of entry of the case management order. Additionally, the Court should have the authority to stay (for reasonable periods) discovery or other litigation transactions in order to reduce the costs to parties and to facilitate mediation. Alternatively, the Court should be able, in appropriate cases, to stay the mediation process. Nothing in these Rules is intended to limit the Court's ability to conduct settlement conferences pursuant to Fed. R. Civ. P. 16. Further, the committee further recommends that the Local Rules governing ADR in the Western Division be interpreted by the Court with flexibility in allowing the parties the alternative of electing private avenues of alternative dispute resolution such as private arbitration or mediation.

(b) Complementary Alternative Dispute Resolution. Nothing in these Local Rules shall be interpreted as limiting the Court or the parties from engaging in ADR outside of the Court's mediation program. The Court shall have the authority to engage the parties in accordance with Fed. R. Civ. P. 16 and, additionally, the Court may, at its discretion, allow the parties a reasonable opportunity to participate in private ADR. Private ADR proceedings are not subject to the enforcement, immunity or other provisions of the ADR Local Rules.

(c) Relief From Court Ordered Mediation. Any party whose case has been ordered to mediation may file with the ADR Magistrate Judge, within 10 days of Court ordered referral, a motion for relief from the Court ordered referral. The party seeking relief shall demonstrate that mediation would not be likely to deliver benefits to the parties sufficient to justify the resources consumed by its use and/or would impose an undue hardship upon the moving party and/or would unnecessarily increase litigation costs. The parties may file a joint motion under this Rule.

2-4. Mediators.

(a) Panel. The ADR Unit shall maintain a panel of mediators serving in the Court's ADR mediation programs. Mediators will be selected from time to time by the Court from applications submitted by lawyers willing to serve or by other persons as set forth below. The ADR Director and ADR Program Counsel may serve as mediators. The panel of mediators shall be available on the website for the Court at http://www.ilnd.uscourts.gov.

(b) Qualifications and Training. Each lawyer serving as a mediator in a Court ADR program shall be a member of the bar of this Court or a member of the faculty of an accredited law school and shall successfully complete initial and periodic training as required by the Court. Additional minimum requirements for serving on the Court's panel are that mediators shall have been admitted to the practice of law for at least 7 years and shall be knowledgeable about civil litigation in federal court. Mediators shall have strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations. Mediators shall have sufficient experience and familiarity with the field of law in which they are serving so as to provide the parties with credible evaluation and assessment of their relative positions. Mediators who are not lawyers may also be selected to serve on the Court's panel of mediators if they have appropriate professional credentials in another discipline and are knowledgeable about civil litigation in federal court. The Court may modify, in individual circumstances for good cause, all of the requirements of this paragraph.

(c) Oath. Persons serving as mediators in any of the Court's ADR programs shall take the oath or affirmation prescribed in 28 U.S.C. § 453.

(d) Disqualification of Mediators. No person may serve as a mediator in a case in a Court ADR program in violation of the standards set forth in 28 U.S.C. § 455.

(e) Immunities. All persons serving as mediators 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.

2-5. Evaluation of ADR Programs.

Congress has mandated that the Court's ADR programs be evaluated. Mediators, counsel and clients shall promptly respond to any inquiries or questionnaires from persons authorized by the Court to evaluate the programs. Responses to such inquiries will be used for research and monitoring purposes only.

3. CERTIFYING THE ADR MEDIATION PROCESS

3-1. Meet and Confer to Select ADR Mediation Process.

After the filing of a civil case or its removal to the District Court, counsel shall confer to attempt to agree on an ADR mediation process, including the selection of a mediator from the Court's panel of mediators as found on the Court's website at http://www.ilnd.uscourts.gov. At the initial case management conference before the Court, counsel shall be expected to report to the Court on whether agreement on Court referred mediation has been reached and whether a mediator has been selected.

3-2. ADR Certification.

Unless otherwise ordered, no later than the date specified in the Case Management Order, the parties through their attorneys shall file with the Court a certification that:

(a) Each has read the Local Rules and pamphlet governing the Court's mediation program;

(b) The attorneys have discussed with their respective clients the available dispute resolution options provided by the Court and private entities;

(c) An estimate of the fees and costs that would be associated with litigation of the matter, through trial, has been given to the client; and

(d) The mediator has been selected by the parties and the date of mediation or the other method of ADR selected is identified. This certification may be contained in the body of the CMO.

3-3. Conference.

If counsel are unable to agree on the selection of a mediator from the Court's panel of available mediators, the Court shall assist the parties in the selection of a mediator.

4. MEDIATION

4-1. Description.

Mediation is a flexible, non-binding, confidential process in which a neutral person (the mediator) facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy. Consistent with the principles of impartiality and party self-determination, a mediator may be expected, in appropriate cases, to offer the parties frank and confidential evaluations of the relative strengths, weaknesses, and risks of their respective cases.

4-2. Eligible Cases.

Subject to the availability of administrative resources and of a suitable mediator, appropriate civil cases may be referred to mediation by order of the Judge following a stipulation by all parties, on motion by a party, or on the Judge's initiative.

4-3. Mediators.

(a) Appointment. A list of mediators on the ADR panel shall be maintained on the Court's website (http://www.ilnd.uscourts.gov) and, after agreement of the parties that the case should be referred to mediation or entry of an order referring a case to mediation, the parties should select a mediator or seek the assistance of the Court in choosing a mediator for appointment as the mediator for the case.

(b) Compensation. Mediators shall be compensated at their usual customary rates or such other rate that all parties agree to pay. Compensation of

the mediator shall be agreed upon by the parties and the mediator prior to mediation. If the parties fail to reach agreement prior to mediation, the parties will share the cost of the mediator on a *pro rata* basis. Mediators may charge for reasonable time used to prepare for mediation. No party may offer or give the mediator any gift.

(c) Payment. All terms and conditions of payment must be clearly communicated to the parties. The parties may agree to pay the fee in other than equal portions. The parties shall pay the mediator directly.

4-4. Timing and Scheduling the Mediation.

(a) Scheduling by Mediator. Promptly after being selected for a case, the mediator shall arrange for the pre-mediation conference under ADR L.R. 4-6 and, after consulting with all parties, shall fix the date and place of the mediation within the deadlines set by paragraph (b) below, or the order referring the case to mediation. Counsel shall respond promptly to and cooperate fully with the mediator with respect to scheduling the pre-session phone conference and the mediation session.

(b) Deadline for Conducting Mediation. Unless otherwise ordered, the mediation shall be held within 60 days after entry of the Case Management Order or the Order of Referral whichever is appropriate.

4-5. Request To Extend the Deadline.

(a) Motion Required. Requests for extension of the deadline for conducting a mediation shall be made to the ADR Magistrate Judge, with a copy to the other parties, the mediator (if selected), and the ADR Unit.

(b) Content of Motion. Such motion shall:

(1) Detail the considerations that support the request;

(2) Indicate whether the other parties concur in or object to the request; and

(3) Be accompanied by a proposed order setting forth a new deadline by which the mediation shall be held.

4-6. Contact With The Mediator Before The Session

The mediator may schedule a brief joint conference with counsel before the mediation session to discuss matters such as the scheduling of the mediation,

the procedures to be followed, the nature of the case, which client representatives will attend, and if the 4-7 written statements should be exchanged by counsel.

4-7. Written Mediation Statements.

(a) Time for Submission. No later than 10 calendar days before the first mediation session, or in the time established by the mediator, each party shall submit directly to the mediator, a written Mediation Statement. The statement may be transmitted solely to the mediator. Whether the statement will be sent solely to the mediator, or exchanged by the parties, will be determined at the ADR L.R. 4-6 conference.

(b) Prohibition Against Filing. The statements shall not be filed.

(c) Content of Statement. The statements shall be concise, no more than five pages in length, and may include any information that may be useful to the mediator and, unless directed otherwise by the mediator, shall:

(1) Identify, by name and title or status:

(A) The person(s) with decision-making authority, who, in addition to counsel, will attend the mediation as representative(s) of the party, and

(B) Persons connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the mediation or the prospects for settlement;

(2) Describe briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

(3) Identify the discovery or motions that promise to contribute most to equipping the parties for meaningful settlement negotiations;

(4) Describe the history and current status of any settlement negotiations and provide any other information about any interests or considerations not described elsewhere in the statement that might be pertinent to settlement; and

(5) Include copies of documents likely to make the mediation more productive or to materially advance settlement prospects.

4-8. Attendance at Session.

(a) Parties. All named parties and their counsel are required to attend the mediation unless excused under paragraph (d) below. With the prior permission of the Court, a party, or multiple parties represented by the same counsel, may appear through a representative so long as the party's representative is authorized to negotiate settlement on behalf of the party. This requirement reflects the Court's view that the principal values of mediation include affording litigants opportunities to articulate directly to the other parties and a neutral their positions and interests and to hear, first hand, their opponent's version of the matters in dispute. Mediation also enables parties to search directly with their opponents for mutually agreeable solutions.

(1) Corporation or Other Entity. A party other than a natural person (e.g., a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to negotiate settlement and who is knowledgeable about the facts of the case.

(2) Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to negotiate settlement, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

(b) Counsel. Each party shall be accompanied at the mediation by the lawyer who will be primarily responsible for handling the trial of the matter.

(c) Insurers. Insurer representatives are required to attend in person unless excused under paragraph (d) below, if their agreement would be necessary to achieve a settlement.

(d) Request to be Excused. A person who is required to attend a mediation may be excused from attending in person only after a showing that

personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must submit, no fewer than 15 days before the date set for the mediation, a motion to the ADR Magistrate Judge, simultaneously copying the ADR Unit, all counsel and the mediator. The motion shall:

(1) Set forth all considerations that support the request;

(2) State realistically the amount in controversy in the case;

(3) Indicate whether the other party or parties join in or object to the request, and

(4) Be accompanied by a proposed order.

(e) Participation by Telephone. A person excused from appearing in person at a mediation shall be available to participate by telephone.

4-9. Procedure at Mediation.

(a) Procedure. The mediation shall be informal. Mediators shall have discretion to structure the mediation so as to maximize the benefits of the process.

(b) Separate Caucuses. The mediator may hold separate, private caucuses with each side or each lawyer or, if the parties agree, with the clients only. The mediator may not disclose communications made during such a caucus to another party or counsel without the consent of the party who made the communication.

4-10. Confidentiality.

All materials exchanged and statements made as part of the mediation process conducted pursuant to these rules are confidential.

Commentary

See, Fed. R. Evid. 408; 28 U.S.C. § 652(d). Full and candid discussion is essential to successful resolutions in mediation. Such discussion is best supported by an assurance that mediation communications will be held in strictest confidence. The law may provide some limited circumstances in which the need for disclosure outweighs the importance of protecting the confidentiality of a mediation. *E.g.,* threats of death or substantial bodily injury (*see* Or. Rev. Stat. Section 36.220(6)); use of mediation to commit a felony (*see* Colo. Rev. Stat. Section 13-22-307); right to effective cross examination in a quasi-criminal proceeding (*see Rinaker v. Superior Court,* 62 Ca1. App. 4th 155 (3d Dist. 1998)); lawyer duty to report misconduct (*see In re Waller,* 573 A.2d 780 (D.C. App. 1990)); need to prevent manifest injustice (*see* Ohio Rev. Code Section 2317.023(c)(4)).

4-11. Follow Up.

In the event a mediation conference does not result in an agreed upon resolution of the case at the close of the mediation session, the mediator and the parties shall jointly determine whether it would be appropriate to schedule a follow up session. Such follow up could include, but need not be limited to, written or telephonic reports that the parties might make to one another or to the mediator, exchange of specified kinds of information, or another mediation session. The mediator may, to the extent agreed upon by the mediator, the parties, and the Court, stay involved in the case following mediation and up to the time of trial in order to continue to facilitate resolution.

4-12. Certification of Session.

Within 10 days of the close of each mediation session and on the form Certification of Session provided by the Court, the mediator shall report to the ADR Unit: the date the session was held, whether the case settled in whole or in part, whether any follow-up is scheduled, any stipulations the parties agree may be disclosed, and any other data necessary for the effective management of the program which would not violate expectations of confidentiality. The ADR Unit will file the certification.

Within the same 10 day period, if a settlement was reached, the mediator shall help the parties draft a settlement agreement and a stipulation and proposed order to dismiss which, when executed, is filed with the Court.

4-13. Violation of the ADR Local Rules.

(a) Reporting Violation.

(1) Complaints Alleging Material Violations. A complaint alleging that any person or party, including the mediator, has materially violated any of the ADR Local Rules shall be presented in writing directly to the ADR Magistrate Judge. Such a letter of complaint must be accompanied by a competent declaration. Copies of the letter of complaint and declaration must be sent contemporaneously to all other parties, the mediator (if identified) and the ADR Unit. The letter of complaint and declaration shall not be filed.

(2) Report by Mediator. A mediator who perceives a material violation of these ADR Local Rules shall make a written report directly to the ADR Magistrate Judge and contemporaneously provide copies to all counsel and to the ADR Unit. Such report shall not be filed.

(b) Proceeding in Response to Complaint or Report of Violation and Sanctions. If, upon receiving an appropriately presented and supported complaint or report of a material violation of these ADR Local Rules, the ADR Magistrate Judge determines that the matter warrants further proceedings, the ADR Magistrate Judge shall order a party to file a formal appropriate motion with the court, which will then be heard by the ADR Magistrate Judge. All parties shall be allowed to participate at the hearing and present appropriate evidence.

APPENDIX B

Forms:

Certification of Session
Attorney Evaluation Questionnaire
Party Evaluation Questionnaire
Mediator Evaluation Questionnaire

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

MEDIATOR CERTIFICATION OF SESSION
(TO BE COMPLETED AT THE END OF EACH MEDIATION SESSION)

Mediator Name:_____ Case Number:_____

The undersigned mediator, appointed pursuant to order entered on the ____ day of _____, 2003, reports to the Court as follows:

- A mediation session was scheduled for and held on _____.

- A settlement of this matter
  [ ] has been reached
  [ ] has been reached *in part*
  [ ] has *not* been reached

- [*If a settlement has not been reached and the mediation is ongoing]*
  The mediation has been continued for another session to be held on _____.

- [*If a settlement was reached*]
  The party designated to prepare the settlement agreement and stipulation to dismiss is _____; to be submitted to the court by_____.
  [date]

- Stipulating parties agreed upon:

  _____

  _____

IF THIS IS THE FINAL MEDIATION SESSION IN THIS CASE, PLEASE CONTINUE:

Date mediation began:_____ Date ended:_____ Number of Sessions:_____

Hours in mediation:_____ Hours of Preparation:_____

How many from each category attended?
_____ Lawyers
_____ Clients
_____ Non-parties (please list, e.g., witnesses, spouse)_____

Which of the following were used to conduct or assist in the mediation process?
[ ] In-person meetings _____%
[ ] Telephone _____%
[ ] E-mail or internet _____%

Signature of Mediator:_____ Dated:_____

U.S. DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS (WESTERN DIVISION)
MEDIATION EVALUATION FORM
-- For Attorneys --

Please promptly fill out this form after the mediation conference and return it to the ADR Administrator via fax at 815-987-4291. No case identification will be associated with these responses for purposes other than program evaluation.

Name of Mediator: _____

Case Number: _____

Date of Mediation: _____ Type of Case: _____

Outcome: [ ] settled [ ] partially settled [ ] not settled [ ] continued for further mediation

Number of mediation sessions held: _____ Number of hours spent in mediation: _____

Are you the [ ] defendant's attorney [ ] plaintiff's attorney

Number of cases in which you have participated in mediation prior to this one: _____

1. On a scale of 1 – 5 (1 = strongly disagree, 2 = disagree, 3 = neither agree nor disagree, 4 = agree, 5 = strongly agree), please respond to the following:

	SD	D	N	A	SA
a) The mediator was well-prepared for the mediation:	1	2	3	4	5
b) My client(s) and I understood the mediation process after it was explained:	1	2	3	4	5
c) The mediator helped the parties to generate options:	1	2	3	4	5
d) The mediator effectively moved the parties toward settlement:	1	2	3	4	5
e) The mediator was knowledgeable about the law in this case:	1	2	3	4	5
f) The mediation helped narrow or clarify the issues involved in this case:	1	2	3	4	5
g) Overall, I am satisfied with the mediation process:	1	2	3	4	5
h) The process was fair to all parties:	1	2	3	4	5
i) Overall, I am satisfied with what was accomplished in the mediation:	1	2	3	4	5
j) Overall, I am satisfied with the agreement (if reached):	1	2	3	4	5

2. Overall, how helpful or detrimental was the mediation in the resolution of this case?
   1. [ ] Very helpful
   2. [ ] Somewhat helpful
   3. [ ] It had little impact on the case
   4. [ ] Somewhat detrimental
   5. [ ] Very detrimental

3. The overall length of mediation was: [ ] too long [ ] too short [ ] about right

4. Did the mediator appear to have a bias for the [ ] Plaintiff? [ ] Defendant? [ ] No Bias

5. Do you think the assignment of this case to mediation:
   [ ] Facilitated (or will facilitate) its early resolution
   [ ] Will increase time to resolution
   [ ] Will have no impact on time to resolution

6. Do you think the assignment of this case to mediation:
   [ ] Has reduced (or will reduce) litigation costs to your client
   [ ] Will increase litigation costs to your client
   [ ] Will have no effect on costs to your client

7. If the case did not settle, why not?

_____
_____

8. Would you be willing to use mediation again?
   [ ] Yes [ ] No

   Why or why not? _____
   _____

9. Would you be willing to use *this* mediator again?
   [ ] Yes [ ] No

   Why or why not? _____
   _____

10. Comments on the mediator or the mediation process:

U.S. DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS (WESTERN DIVISION)
MEDIATION EVALUATION FORM
-- For Parties --

Please promptly fill out this form after the mediation conference and return it to the ADR Administrator via fax at 815-987-4291. No case identification will be associated with these responses for purposes other than program evaluation.

Name of Mediator: _____

Case Number: _____

Date of Mediation: _____ Type of Case: _____

Outcome: [ ] settled [ ] partially settled [ ] not settled [ ] continued for further mediation

Number of mediation sessions held: _____ Number of hours spent in mediation: _____

Are you the [ ] defendant [ ] plaintiff

Number of cases in which you have participated in mediation prior to this one: _____

1. On a scale of 1 – 5 (1 = strongly disagree, 2 = disagree, 3 = neither agree nor disagree, 4 = agree, 5 = strongly agree), please respond to the following:

	SD	D	N	A	SA
a) The mediator was well-prepared for the mediation	1	2	3	4	5
b) I understood the mediation process:	1	2	3	4	5
c) The mediator allowed me to fully present my case:	1	2	3	4	5
d) The mediator carefully listened to my side of the case:	1	2	3	4	5
e) The mediator helped me to generate options for settling the dispute:	1	2	3	4	5
f) The mediation asked appropriate questions to determine the facts of the case:	1	2	3	4	5
g) Overall, I am satisfied with the mediation process:	1	2	3	4	5
h) The process was fair to all parties:	1	2	3	4	5
i) Overall, I am satisfied with what was accomplished in the mediation:	1	2	3	4	5
j) Overall, I am satisfied with the agreement (if reached):	1	2	3	4	5

2. Overall, how helpful or detrimental was the mediation in the resolution of this case?
   1. [ ] Very detrimental;
   2. [ ] Somewhat detrimental;
   3. [ ] It had little impact on the case;
   4. [ ] Somewhat helpful;
   5. [ ] Very helpful

3. The overall length of mediation was: [ ] too long [ ] too short [ ] about right

4. Did the mediator appear to have a bias for the [ ] Plaintiff? [ ] Defendant? [ ] No Bias

5. Do you think the assignment of this case to mediation:
   [ ] Facilitated (or will facilitate) its early resolution
   [ ] Will increase time to resolution
   [ ] Will have no impact on time to resolution

6. Do you think the assignment of this case to mediation:
   [ ] Has reduced (or will reduce) litigation costs
   [ ] Will increase litigation costs
   [ ] Will have no effect on costs

7. If the case did not settle, why not?

_____
_____

8. Would you be willing to use mediation again?
   [ ] Yes [ ] No

   Why or why not? _____
   _____

9. Would you be willing to use *this* mediator again?
   [ ] Yes [ ] No

   Why or why not? _____
   _____

10. Comments on the mediator or the mediation process:

U.S. DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS (WESTERN DIVISION)
MEDIATION EVALUATION FORM
-- For Mediators --

Please fill out this form and return it to the ADR Administrator via fax at 815-987-4291 within 10 days of the mediation session. No case identification will be associated with these responses for purposes other than program evaluation.

Name: _____

Case Number: _____

Date of Mediation: _____ Type of Case: _____

Outcome: [ ] settled [ ] partially settled [ ] not settled [ ] continued for further mediation

Number of cases for which you have acted as mediator prior to this one: _____

1. On a scale of 1 – 5 (1 = strongly disagree, 2 = disagree, 3 = neither agree nor disagree, 4 = agree, 5 = strongly agree), please respond to the following:

	SD	D	N	A	SA
a) This case was appropriate for mediation:	1	2	3	4	5
b) This case was referred to mediation at the appropriate time:	1	2	3	4	5
c) The lawyers were prepared for the mediation:	1	2	3	4	5
d) The litigants were prepared for the mediation:	1	2	3	4	5
e) The litigants were actively involved in the mediation:	1	2	3	4	5
f) The mediation helped narrow or clarify the issues involved in this case:	1	2	3	4	5
g) I have expertise in this type of dispute:	1	2	3	4	5
h) Overall, I am satisfied with what was accomplished in the mediation:	1	2	3	4	5

2. Overall, how helpful or detrimental was the mediation in the resolution of this case?
   1. [ ] Very helpful
   2. [ ] Somewhat helpful
   3. [ ] It had little impact on the case
   4. [ ] Somewhat detrimental
   5. [ ] Very detrimental

3. The overall length of mediation was: [ ] too long [ ] too short [ ] about right

4. Do you think the assignment of this case to mediation:
   [ ] Helped the case resolve *more quickly*
   [ ] Will *increase* the time it takes to resolve the case
   [ ] Will have *no effect* on the time it takes to resolve the case

5. Do you think the assignment of this case to mediation:
   [ ] Has *reduced* (or will reduce) litigation costs to the parties
   [ ] Will *increase* litigation costs to the parties
   [ ] Will have *no effect* on costs to the parties

6. If the case did not settle, why not?

_____
_____
_____

7. Please check the actions you undertook in the mediation:

[ ] Focused on legally relevant issues	[ ] Gave primacy to parties' needs & interests
[ ] Focused on the evidence of the case	[ ] Focused on parties' perception of case
[ ] Gave an advisory opinion of the likely outcome	[ ] Helped parties determine strengths & weaknesses of case
[ ] Provided parties with particular settlement proposal or range	[ ] Helped parties generate own options

8. Comments on the program: