

OVERVIEW OF MEDIATION/ADR PROCESSES

The District of Delaware has adopted an ADR program, whereby it currently uses the Magistrate Judge to conduct mediation, settlement conferences, binding and non-binding arbitrations and early neutral evaluations on a case-by-case basis. Counsel and the litigants are encouraged by the Court to explore alternative dispute resolutions with the Magistrate Judge. All civil cases, except those filed by prisoners, are eligible for ADR. Generally, during the initial scheduling conference, the ADR options are discussed and the District Judge may include in the Rule 16 Order a referral to the Magistrate Judge for ADR. The parties may also stipulate to ADR.

CASE SELECTION

Eligible Cases: All civil cases, except prisoner petitions and habeas proceedings, may elect to use ADR. To date, it has been used by cases involving contracts, personal injury, employment discrimination and other civil rights matters, trademark, copyright, patent claims, securities, environmental matters, and adversarial matters in bankruptcy.

Excluded Cases: Unless otherwise assigned by a judge, prisoner and habeas petitions are excluded.

Referral Method and Notice to Parties: During the initial (Rule 16) conference, the parties are advised of the referral for alternative dispute resolution to the Magistrate Judge. The scheduling order as a result of that conference contains the referral. At the initiate scheduling conference, the District Judge will discuss ADR with the parties. Generally, all District Court Judges refer matters for discussion regarding ADR with the Magistrate Judge during the Judge's Rule 16 Conference. Any civil action may also be referred on the Court's own motion or by stipulation of the parties. Thereafter, the Magistrate Judge notifies the parties through an order as to the date and time of the teleconference to discuss the form of alternative dispute resolution to be used, the procedures to be followed and the timing of the dispute resolution conference, as well as the submission of materials to the Magistrate Judge for review prior to the dispute resolution conference. Dispute resolution conferences will not be scheduled prior to the Rule 16 scheduling conference, unless referred by the District Judge.

Opt-Out or Removal by the Court or Parties: Parties may opt out of participating in the ADR process only by consent of the Court.

TIMING FOR THE MEDIATION PROCESS

Timing for the Mediation Referral: See above.

Timing and Nature of Submissions Required Before the Mediation Session:

Generally, the submissions by the parties are controlled by the settlement/mediation conference order. Usually, each party must provide the Magistrate Judge with a concise memorandum setting forth the party's position, concerning the issues to be resolved through mediation, not less than **ten (10) days** prior to the scheduled conference. This mediation statement does not become part of the Court record, is not exchanged among the parties or counsel, and is not provided to the trial judge. The statement may be in memorandum or letter form and must contain the following information: a description of who the parties are, their relation, if any to each other and by whom each party is represented; a brief factual background clearly indicating those facts not in dispute; a brief summary of the law indicating applicable statutes and cases (any unreported decisions are to be included as exhibits); an honest discussion of the party's claims and/or defenses, including the strengths and weaknesses of the party's position; a brief description or history of prior settlement negotiations and discussions, including the party's assessment as to why settlement has not been reached, any proposed terms a party wishes discussed or submitted and a description of how a party believes the Court may be able to assist in reaching an agreement. Crucial or pertinent documents or other documentary evidence or a summary of such documents may be submitted with the mediation conference statement. However, the quantity of those exhibits is limited.

Duration of the Mediation Process: In general, a mediation session is scheduled to last all day, approximately eight hours. Trial counsel and the litigants are encouraged to continue with the process with or without Court assistance within a short time after the first session. Depending upon the case, generally, one session is sufficient to determine whether or not the matter may be resolved through mediation. However, it is not uncommon for a subsequent session to occur, or for the Magistrate Judge to continue negotiations through e-mails and telephonic discussions.

KEY PROGRAM FEATURES

Status of Discovery and Motions During Mediation Process: Unless otherwise stipulated by the parties or ordered by the Court, pretrial matters, such as discovery, case dispositive motions and status reports and conferences proceed as pursuant to the scheduling order. Generally, litigation is not stayed.

Party Responsibilities: Parties or those individuals on behalf of the parties capable of negotiating a resolution and trial counsel are required to attend the mediation session(s). Parties who fail to appear may be sanctioned. Since all mediations are scheduled pursuant to a Court Order, a Rule To Show Cause may be issued for non-appearance.

Mediation Logistics and Location: The Magistrate Judge, in consultation with counsel and the litigants, establishes the time for the mediation. The mediation sessions take place at the Courthouse. The Magistrate Judge determines the length and timing of the sessions and the order in which the issues are presented.

Filing of Mediation Outcome: In general, the mediation outcome is not made a part of the Court record. Notification is provided to the assigned judge by the Magistrate Judge as to the outcome of the mediation process. If the first mediation conference does not resolve the matter, the parties are consulted at the close of the conference if further mediation or other forms of ADR would be appropriate. The date and time of an additional mediation session or other ADR is scheduled at that time. If settlement is reached on all issues during the mediation conference, a written agreement in principle as to the settlement is drafted at the close of the conference, or a record is made through a court reporter. If settlement is reached on some issues, the parties must file a stipulation as to those issues and identify the issues remaining in dispute. The Magistrate Judge maintains jurisdiction over any disputes that may arise in the drafting of the final settlement documents.

Confidentiality: Information disclosed to the Magistrate Judge by a party or counsel during the mediation session, including in any written submissions, is not disclosed to the other party without consent. All mediation proceedings are confidential, are not admissible as evidence in any other proceeding, and may not be recorded without prior consent of the parties and the Magistrate Judge.