Chapter 11

Alternative Dispute Resolution: Arbitration, Mediation, and More

Hon. Lois H. Goodman, United States Magistrate Judge[1]

11-1 INTRODUCTION

This chapter surveys alternative dispute resolution (ADR) in the District of New Jersey, including the court-annexed methods that can enable parties to resolve litigation without trial. The oldest and most fundamental ADR mechanism—the judicially hosted settlement conference—was discussed in Chapter 10 (Pretrial Management) and is not included in this survey.

Any ADR process seeks to provide a forum for the prompt, efficient, fair, and final resolution of civil disputes without the delay, expense and uncertainty of trials and appeals. In this court, where only about one percent[2] of civil cases actually reach trial, which is a typical figure nationally, it only makes sense to strive to improve the nontrial methods of case resolution, while always preserving the right to jury trial in these nonbinding processes.

Since 1985, the District of New Jersey has offered a court-annexed Arbitration Program for cases in which money damages are sought not

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1. The views herein are the author's own. Nothing herein represents the view or policy of the United States District Court for the District of New Jersey, which speaks through its Local Rules and Orders. The author gratefully acknowledges the contributions of the Hon. Jerome B. Simandle, Chief Judge of the United States District Court for the District of New Jersey, whose preparation of this chapter for the prior editions serves as the foundation for this revision.

2. In FY 2011, 7,879 new civil cases were filed upon the docket and a total of 121 civil trials (jury and nonjury) were completed. Assuming constant rates of filings and trials, the percentage of cases reaching trial was one percent. Administrative Office of the U.S. Courts, 2011 Annual Report of the Director at Tables C , C-4 & T-1.

exceeding a set minimum (currently $150,000).[3] Today, approximately one-sixth of the civil docket is placed on the arbitration track,[4] in which all pretrial disclosure, discovery, and motions are completed before the case is assigned to a certified arbitrator for a hearing and a nonbinding verdict or "award." An arbitrator serves as a nonjury factfinder, adjudicating the case at a trial-like hearing that is not a negotiation process. If a party rejects the award and requests trial de novo within 30 days, the case is returned to the trial track as if the arbitration never occurred, and the case is scheduled for its final pretrial conference and for trial. The Arbitration Program is discussed further in Section 11-2, below.

The district court added the Mediation Program under Local Rule 301.1 (then General Rule 49) in 1992, at the suggestion of the Civil Justice Reform Act Advisory Committee. A district judge or a magistrate judge may stay the case and refer all or part of a case to be mediated at any point in the litigation, before a trained mediator. When the program began, it provided only for complex cases to be mediated; the success of the program has led to its expansion to include all types of cases the court deems appropriate. Although the number of cases referred to mediation annually is small,[5] the results can be noteworthy when the mediation resolves a vexing commercial, patent, or environmental dispute. A mediator's function is to help the parties and their attorneys find a suitable resolution by negotiation and settlement. If a mediation is unsuccessful, the case returns to the trial track. The Mediation Program is the subject of Section 11-3, below.

Other means of ADR that have met with success in the District of New Jersey include the parties' voluntary retention of a private dispute resolution entity, and the implementation of a settlement protocol under which the parties to a complex, multi-party case design the process for exchanging information, retaining consultants, and negotiating a final or partial settlement. Those alternatives are briefly discussed below in Section 11-4.

The national mandate for federal court ADR built upon the early successes of such programs, including the District of New Jersey's arbitration and mediation pilot programs. In October 1998, Congress

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3. L. Civ. R. 201.1(d)(2).

4. In FY 2011, 1,821 cases were assigned to the arbitration track. Many were resolved through settlement or dispositive motion practice, and 124 were eventually assigned to arbitrators for hearing, resulting in 63 requests for trial de novo. Office of the Clerk, U.S.D.C. for District of New Jersey, Annual Report at 15 (2011).

5. In FY 2011, 115 civil cases were placed into the Mediation Program under Local Rule 301.1. Office of the Clerk, U.S.D.C. for District of New Jersey, Annual Report at 15 (2011).

enacted the Alternative Dispute Resolution Act of 1998 (the ADR Act or the Act), codified at 28 U.S.C. § 651, *et seq*., expanding the statutory authority of federal courts to establish ADR programs. The mandatory and voluntary arbitration programs authorized by Congress in 1988[6] were continued, and all federal courts are now required to administer and evaluate ADR programs of their own design. The ADR Act requires that any such ADR program be established by local rule adopted pursuant to 28 U.S.C. § 2071(a). In 2000, recognizing that any eligible civil action is subject to compulsory arbitration up to the same statutory limit for arbitration by consent, the district court's provisions for arbitration by consent were eliminated.[7]

The ADR Act permits federal courts to require ADR with respect to mediation and early neutral evaluation, and to facilitate arbitration by consent, while maintaining authorization for mandatory arbitration in the existing programs such as the one in New Jersey. The Act also addresses confidentiality of ADR processes, but such provisions of the statute apply only in the absence of a local rule. The District of New Jersey Local Rules require that information disclosed during its ADR hearings remain confidential.[8] Other requirements of the Act, such as establishing the panels of neutrals and their qualifications and training,[9] were likewise preceded by the New Jersey practices in these areas.[10] Local ADR programs must also have suitable rules for disqualification of neutrals, and the District of New Jersey maintains such disqualification rules for both court-appointed

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6. The Federal Courts Improvement Act established pilot ADR programs in multiple states, including New Jersey. 28 U.S.C. § 651, *et seq*. (1988). Ten years later, Congress substantially amended and enlarged the statutory authority for federal ADR in the ADR Act. 28 U.S.C. § 651, *et seq.*

7. *See* L. Civ. R. 201.1 and Appendix M, § X.

8. L. Civ. R. 301.1(e)(5); *see also* Appendix Q, § II.B ("Neither the parties nor the mediator may disclose any information presented during the mediation process without consent. The only exception to this rule of confidentiality is when disclosure may be necessary to advise the compliance judge of an apparent failure to participate in the mediation process.").

9. 28 U.S.C. § 653(a) & (b).

10. The certification of arbitrators by the Chief Judge is addressed in Local Rule 201.1(a), and arbitrators are deemed quasi-judicial officers of the Court. L. Civ. R. 201.1(a)(5). The certification of mediators by the Chief Judge is addressed in Local Rule 301.1(a), and mediators are likewise deemed quasi-judicial officers of the Court. L. Civ. R. 301.1(a)(3).

arbitrators and mediators.[11] The ADR Act also confers quasi-judicial immunity upon the court-annexed arbitrators and mediators.[12]

11-2 ARBITRATION

11-2:1 Overview

New Jersey has been one of 10 pilot courts for arbitration since 1985. The success of this program and others led to passage in 1988 of the Federal Courts Improvement Act.[13] Two years later, the Federal Judicial Center in Washington published its congressionally mandated study of the effectiveness of arbitration in the 10 pilot courts. Thanks largely to the efforts of the appointed arbitrators and the litigators, New Jersey ranked first in the following measures:

- most cases concluded through arbitration;
- lowest percentage of arbitration cases requiring trial to verdict; and
- highest degree of litigant satisfaction.[14]

New Jersey's arbitration program is governed by Local Rule 201.1 and the Guidelines for Arbitration, located at Appendix M to the Local Rules. These sources will answer almost any question about the arbitration program.

As stated in the introduction, New Jersey's arbitration program is court-annexed and compulsory. The court chooses a single arbitrator from an internal list of qualified neutral attorneys.[15] Currently, an arbitrator is paid $250 for each case assigned to him or her, and the fee is paid by the court.[16]

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11. An arbitrator is subject to statutory disqualitifcation for bias or prejudice to the same extent as a judicial officer under 28 U.S.C. § 144, and shall disqualify himself/herself in circumstances creating an actual or apparent conflict of interest under the standard of 28 U.S.C. § 455. *See* L. Civ. R. 201.1(e)(5). The actual restrictions upon mediators are not statutory but are explicit nonetheless in Local Rule 301.1(g)(1) & (2), and the Court has established a grievance procedure for the conduct of a mediator, attorney, or participant in mediation in Local Rule 301.1(h).

12. 28 U.S.C. § 655(c).

13. 28 U.S.C. § 651, *et seq*. Ten years later, Congress substantially amended and enlarged the statutory authority for federal court ADR programs in the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651, *et seq*.

14. Federal Judicial Center, *Court Annexed Arbitrations in Ten District Courts* 49, 64, 68, 77-80 & 90 (1990).

15. L. Civ. R. 201.1(c) and (e)(3).

16. L. Civ. R. 201.1(c). In cases where an arbitration hearing is protracted, the court may award additional compensation if the arbitrator petitions the court to do so. *Id.*

A good working definition of court-annexed arbitration, which also fits our court's program, may be stated as follows:

> Court-annexed arbitration is an adjudicatory dispute resolution process in which one or more arbitrators issue a nonbinding judgment on the merits after an expedited, adversarial hearing. The arbitrator's nonbinding decision addresses only the disputed legal issues and applies legal standards. Either party may reject the nonbinding ruling and request a trial *de novo* in district court.[17]

Some highlights of the District's arbitration process are:

- Compulsory but nonbinding for all cases in which only money damages are being sought in an amount not in excess of $150,000, exclusive of interest, costs, and punitive damages, except for claims of constitutional rights, tax refunds, or Social Security appeals. (Local Rule 201.1(d)(1)-(3)).
- All discovery and motion practice is completed before hearing. (Local Rule 201.1(e)(3); Appendix M, § I).
- Single-arbitrator hearing. (Local Rule 201.1(e)(2)).
- No fee for arbitration hearing or for trial de novo.
- Arbitration hearing conducted similar to nonjury trial, not a "paneling" or settlement conference device. (Appendix M, §§ II & III).
- Federal Rules of Evidence are used as a guide; parties normally testify in person, documents are introduced, and other evidence may be proffered orally by counsel if supported by factual reference to another evidentiary source. (Local Rule 201.1(f)(5)).
- Arbitrator enters award within 30 days after conclusion of arbitration hearing and briefly states reasons in writing. (Local Rule 201.1(g)).
- Any party may demand trial de novo within 30 days of entry of award. (Local Rule 201.1(h)). If so, the case is

17. Center for Public Resources/CPR Legal Program, Judges' Deskbook on Court ADR 29 (1993).

returned to the trial list as if it had not been referred to arbitration. 28 U.S.C. § 657(c)(2).

- If no timely request for trial de novo is made, the award is converted to a judgment entered after the 30th day. (Local Rule 201.1(g)). Such judgment is nonappealable. (Local Rule 201.1(g)).

11-2:2 Cases Subject to Arbitration

11-2:2.1 Mandatory

In New Jersey, arbitration is compulsory for any case seeking only monetary damages that do not exceed $150,000, exclusive of interest, costs, and any claim for punitive damages.[18] The matters excluded from compulsory arbitration include claims of constitutional violation, tax refund actions, and Social Security actions.[19] If only money damages are sought in a case, it will be *presumed* to be an arbitration case unless counsel files a signed document certifying that the damages recoverable exceed $150,000.[20] This document must be filed with the first pleading or, in the case of removal, within 30 days of the filing of a notice of removal.[21] Otherwise, a case can be deleted from the arbitration track by order to show cause (initiated by the court), upon a recommendation from the arbitrator, or by application (initiated by a party).[22]

If a case remains in arbitration, however, there is no $150,000 cap on the amount of the arbitrator's award.[23] This means that if the arbitrator views the case as having a value exceeding $150,000, he or she may enter the higher award. This is not an infrequent occurrence, and it leads to resolution of many cases with figures in excess of $150,000.

11-2:2.2 Voluntary

Parties to cases not subject to mandatory arbitration may consent to arbitrate under Appendix M, § X at any time prior to the commencement of trial. The parties should discuss this prospect at the initial conference

18. L. Civ. R. 201.1(d)(1).
19. L. Civ. R. 201.1(d)(2).
20. L. Civ. R. 201.1(d)(3).
21. L. Civ. R. 201.1(d)(3).
22. L. Civ. R. 201.1(e)(6).
23. L. Civ. R. 201.1(d)(3) & Appendix M, § VII.

with a magistrate judge. Arbitration by consent is nonbinding, unless the parties otherwise agree. Such voluntary arbitration is not "court-annexed" and the case would be administratively terminated until the voluntary ADR effort is concluded.[24] The arbitrator's fee must be borne by the parties in a voluntary arbitration, since the Court's authority for paying the neutral extends only to the mandatory arbitration program.

11-2:3 Preparing for Arbitration

11-2:3.1 Completion of Discovery and Motion Practice

In arbitration cases, the scheduling order will provide the parties with time to conclude fact discovery,[25] expert discovery, and dispositive motion practice[26] before the matter is scheduled for its hearing. Attorneys should ensure that discovery is complete before the arbitration hearing because the discovery period will not be reopened upon a post-arbitration request for trial de novo, unless previously ordered by the magistrate judge.[27] This is not a settlement conference or a "paneling" conference, but is more akin to a nonjury trial with relaxed rules of evidence and procedure, dependent upon the completion of pretrial discovery.

11-2:3.2 Submissions to Arbitrator

There are two waves of submissions to the appointed arbitrator before the hearing. First, within 14 days of receipt of the order appointing the arbitrator, counsel for the parties shall forward to the arbitrator copies of

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24. Appendix M, § X.

25. For example, discovery requests may not be served after the arbitration hearing has been scheduled. *RLA Mktg, Inc. v. Wham-O, Inc.,* No. 04-3442, 2007 U.S. Dist. LEXIS 16629 (D.N.J. Mar. 7, 2007). Indeed, "all pre-trial matters must be completed prior to arbitration as if arbitration itself were the trial." *Id.* at *18.

26. For timely filed dispositive motions, the judge must decide them before signing the order for an arbitration hearing. But once the order for hearing is signed, the filing of a dispositive motion shall not operate to stay arbitration unless the judge so orders. L. Civ. R. 201.1(e)(3). The arbitrator, of course, is empowered to decide questions of law presented in the arbitration hearing, such as statute of limitations, choice-of-law, statutory damages, and counsel fees, to name but a few, commensurate with the function of the arbitration hearing as "similar in purpose to a bench trial but without the formality required by the Federal Rules of Evidence." Appendix M, § I.

27. The reopening of discovery after an arbitration hearing is rare and requires a showing of good cause before the magistrate judge. Reopening of discovery is likely to be denied where, for example, the requesting party had ample opportunity to obtain the discovery, and deadlines for doing so had been enlarged and ignored before the arbitration hearing. *Norton v. Midwest Airlines,* No. 05-3701, 2008 U.S. Dist. LEXIS 938 (D.N.J. Jan. 4, 2008); *accord RLA Mktg., Inc. v. WHAM-O, Inc.*, No. 04-3442, 2007 U.S. Dist. LEXIS 16629 (D.N.J. Mar. 7, 2007).

all pleadings.[28] Second, at least 14 days before the hearing, each counsel shall deliver to the arbitrator and to adverse counsel premarked copies of all exhibits, including expert reports and all portions of depositions and interrogatories to which reference will be made at the hearing (but not including documents, if any, intended solely for impeachment).[29] Unless requested by the arbitrator, pre-hearing memoranda are not required by the rules.

11-2:3.3 Pre-Hearing Conference with Arbitrator

It is good practice for the arbitrator to conduct a prehearing telephone conference with the attorneys before the hearing, and after the submissions have been received. The purpose of this conference call is to discuss the agenda for the hearing, including the identity of any live witnesses, and to resolve any other prehearing concerns.[30] Upon appointment, the arbitrator may send a letter to counsel reiterating the requirements of the rules and scheduling the conference.

11-2:4 Arbitration Hearing

11-2:4.1 Generally

The arbitration hearing is conducted before a single arbitrator, at the courthouse or in the arbitrator's office, in a manner similar to a bench trial. The philosophy of the successful program in this District is to afford a full and fair hearing before an experienced and neutral attorney who serves as a "non-jury adjudicator of the facts based upon evidence and arguments presented at the arbitration hearing."[31] This means that the arbitrator is *not* a mediator or settlement judge, and he or she may decline to entertain settlement discussions. The overall success of this adjudicatory model can probably be attributed in large part to the arbitrators' adherence to the court's admonition: "The Court expects that the arbitrator and counsel shall strive at all times to preserve the essential functions of a finder of facts at a hearing which, though less formal than a trial, nonetheless inspires similar confidence in the objectivity and validity of the factfinding process."[32]

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28. L. Civ. R. 201.1(e)(4).
29. *See* Appendix M, § VI ; L. Civ. R. 201.1(f)(5).
30. *See* Appendix M, § VI.
31. Appendix M, § II.B.
32. Appendix M, § II.B.

11-2:4.2 Evidence by Proffer and by Live Testimony

The arbitrator controls the presentation of proofs at the hearing, exercising the powers enumerated under the *Guidelines for Arbitration* in Appendix M, § II.A.

The suggested format for presenting evidence at the hearing envisions a combination of exhibits, affidavits, deposition transcripts, expert reports, and, if desirable, live testimony under oath. The *Guidelines for Arbitration* have a more complete description of the hearing format in subsection III. The use of live testimony is encouraged where necessary to aid the arbitrator's fact-finding function. Indeed, the arbitrator has power to compel the presence of witnesses and to swear witnesses.[33] Remember that counsel may use in his or her direct case only those exhibits that have previously been identified and submitted to the arbitrator 14 days before the hearing.

The typical agenda for the hearing is presented in subsection VI of the *Guidelines for Arbitration*. The arbitrator is free to vary the agenda as appropriate.

Arbitrators expect the parties to have witnesses prepared to testify under oath and to be subject to cross-examination. The court's subpoena power under Federal Rule 45 applies to attendance of witnesses and production of documents at arbitration hearings.[34] Because the hearing is not merely an opportunity for each side to "tell its side of the case," and, given the need to premark and submit exhibits and to have appropriate witnesses, counsel should not approach the arbitration casually.

11-2:4.3 Resolving Questions of Law

It sometimes becomes necessary for the arbitrator to resolve questions of law, such as the admissibility of evidence, choice-of-law, the burdens of proof, privileges, immunities, and even timeliness of suit. Counsel should endeavor to anticipate such issues and argue their positions as they would before a judge. The arbitrators appreciate receiving copies of key statutes or cases in advance, especially when they may be out-of-state sources. Arbitrators also may request short memoranda on the legal issues in advance of the hearing. If legal issues predominate over factual issues,

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33. *See* L. Civ. R. 201.1(f)(4) and Appendix M, § II.A (8) & (9). Note, however, that the arbitrator does not have the powers of exercising civil or criminal contempt in the event of refusal of a witness to attend under subpoena. Appendix M, § II.A (11)(1).

34. 28 U.S.C. § 656; L. Civ. R. 201.1(f)(4).

or if the legal issues are novel, a party can move to exempt the case from arbitration.[35]

11-2:4.4 Duty of Meaningful Participation

A party has a duty "to participate in the arbitration process in a meaningful manner," because all arbitration efforts can be wasted if a party fails to participate in good faith.[36] If the arbitrator determines that meaningful participation is lacking, the arbitrator will file written findings with the clerk.[37] After notice and an opportunity to be heard,[38] the district judge "may thereupon impose any appropriate sanctions, including, but not limited to, the striking of any demand for a trial *de novo* filed by that party."[39] Such a finding can thus lead to that party's default and the automatic conversion of the arbitrator's award to a final judgment without trial de novo.

This duty to participate meaningfully includes the attendance of the parties and/or corporate representatives at the hearing, in addition to the lawyers. This attendance requirement has been deemed "essential for the hearing to proceed in a meaningful manner."[40] Specifically, the court has determined that "[t]he goals of the arbitration program and the authority of the Court will be seriously undermined if a party were permitted to refuse to attend an arbitration hearing and then demand trial *de novo*."[41]

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35. L. Civ. R. 201.1(e)(6).

36. L. Civ. R. 201.1(f)(3).

37. L. Civ. R. 201.1(f)(3).

38. The district judge, reviewing the arbitrator's findings, must assure that notice is given to all counsel together with "personal notice to any party adversely affected by the arbitrator's determination." L. Civ. R. 201.1(f)(3). The district judge may apply a de novo standard of review to the arbitrator's findings and proposed sanctions. *McCoy v. Port Liberte Condo. Ass'n*, No. 02-1313, 2003 U.S. Dist. LEXIS 26774, at *6, 10-11 (D.N.J. Feb. 10, 2003). A de novo review is indicated by the notion that any adjudication before the district judge will necessarily be fact-intensive, where evidence of meaningful participation was not the focus of the parties' efforts before the arbitrator, but rather a by-product of those efforts. *Id.* at *10-11.

39. L. Civ. R. 201.1(f)(3); *see also Gilling v. Eastern Airlines, Inc.*, 680 F. Supp. 169 (D.N.J. 1988) (imposing award of costs and fees for plaintiff against defendant that was found to have failed to meaningfully participate in the arbitration hearing); *McCoy v Port Liberte Condo. Ass'n*, No. 02-1313, 2003 U.S. Dist. LEXIS 26774, at *13-17 (D.N.J. Feb. 10, 2003) (declining to impose sanctions where defense counsel's failure to submit documents or call witnesses, and lack of civility toward the arbitrator, did not rise to the level of failure to participate where counsel addressed legal issues, cross-examined plaintiff, and made legal arguments to arbitrator); *Watkins v. K-Mart Corp.*, No. 96-4566, 1991 U.S. Dist. LEXIS 14511, at *4-5 (E.D. Pa. Sept. 17, 1997) (finding party's participation sufficiently "meaningful" to avoid striking party's demand for trial de novo).

40. Appendix M, § IV.

41. Appendix M, § IV.

11-2:5 Arbitration Award; Judgment

An arbitrator is required to render a judgment within 30 days after the hearing.[42] The findings must be in writing and concisely state the result of the hearing, along with a statement or summary setting forth the basis for the award.[43] The award is filed with the clerk under seal[44] but is not docketed until 30 days expire. If no party demands trial de novo,[45] the arbitration award is entered as a judgment of the court.[46]

11-2:6 Trial De Novo Request

The deadline for rejecting the arbitration award and demanding trial is 30 days after filing of the award (60 days where the United States or an agency or employee thereof is a party).[47] The trial demand must be in writing, timely filed, and contain "a short and plain statement of each ground in support thereof."[48] There is no fee for filing the request for trial de novo.

Upon the filing of a demand for trial de novo, the case is restored to the trial list. The case is then "treated for all purposes as if it had not been referred to arbitration, except that *no additional pretrial discovery shall be permitted* without leave of Court, for good cause shown."[49] Once a party has filed a timely demand for trial de novo, the party cannot withdraw it and restore the arbitrator's award; indeed, the opponent can rely upon the filing of the trial de novo request and need not file its own request for trial de novo.[50]

Within 60 days from the filing of the demand for trial de novo, the magistrate judge will hold the final pretrial conference, and a final pretrial order will be entered.[51]

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42. L. Civ. R. 201.1(g).

43. L. Civ. R. 201.1(g).

44. Filing the award under seal preserves the confidentiality of the award, as required by 28 U.S.C. § 657(b) and Local Rule 201.1(g).

45. L. Civ. R. 201.1(h).

46. L. Civ. R. 201.1(g).

47. L. Civ. R. 201.1(h)(1).

48. L. Civ. R. 201.1(h)(1).

49. L. Civ. R. 201.1(h)(2) (emphasis added). *See Norton v. Midwest Airlines*, No. 05-3701, 2008 U.S. Dist. LEXIS 938, at *11-13 (D.N.J. Jan. 4, 2008).

50. *D'Iorio v. Majestic Lanes, Inc.*, 370 F.3d 354, 356-57 (3d Cir. 2004) (holding that Alternative Dispute Resolution Act's provision in 28 U.S.C. § 657(c)(2) that once a party timely demands trial de novo the action is treated "as if it had not been referred to arbitration" precludes reinstatement of arbitrator's award even if party later withdraws demand).

51. L. Civ. R. 201.1(h)(3).

Typically, the filing of a demand for trial de novo does not mean that a trial is inevitable. Such cases are usually amicably resolved, often with the arbitrator's award serving as the benchmark of final settlement negotiations.

11-2:7 Compliance Judge for Arbitration

The arbitration program is supervised by a compliance judge who is responsible for administering the program and monitoring the arbitration processes.[52] The compliance judge is not, however, responsible for individual case management, and those duties remain with the district court and magistrate judge who are assigned to the case. Magistrate Judge Joel Schneider is currently the arbitration compliance judge for this District.

11-2:8 Assessing the Arbitration Program

In October 1993, the Lawyers Advisory Committee undertook a survey of all active arbitrators to receive their views on the workings of the Arbitration Program and how it might be improved. The results of the anonymous survey were compiled by Cynthia Jacob, Esquire.[53] The Jacob Study showed a nearly unanimous response: the procedures were fair and nonburdensome, and counsel were well-prepared and took the arbitration seriously, and arbitration was seen as a good predictor of trial outcome.[54]

11-3 MEDIATION

11-3:1 Overview

The court-annexed Mediation Program began on an experimental basis for complex cases in 1992, following the recommendation of the District Court's Civil Justice Expense and Delay Reduction Committee. The experiment's success led to the adoption of a formal program, which was expanded in 1996 to cover all cases. The program was modified in

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52. L. Civ. R. 201.1(b).

53. Jacob, *Arbitration from the Lawyer's Perspective: The New Jersey Experience*, in Mediation and Arbitration in the U.S. District Court for the District of New Jersey (N.J. Institute for Continuing Legal Education: February 5, 1994) [hereinafter Jacob Study].

54. Among the findings of the Jacob Study are these: 100 percent of the respondents believed that in the typical case the arbitration process enhances delivery of justice and produces a fair outcome; 91 percent thought attorneys approached arbitration seriously, as did 97 percent of the parties; 94 percent thought arbitration was a good prediction of trial outcome; 93 percent found it speeded resolution and 87 percent thought it reduced costs. Jacob Study, at 38-39.

1998 to permit participating parties to retain (and reimburse) their own mediators. Mediation is governed by Local Rule 301.1 and the *Guidelines for Mediation,* annexed as Appendix Q to the Local Rules.

The standard definition of court-annexed mediation may be stated as follows:

> Mediation is a flexible, nonbinding dispute resolution process in which an impartial neutral third party—the mediator—facilitates negotiations among the parties to help them reach settlement. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by going beyond the legal issues in controversy.[55]

In contrast to arbitration under Local Rule 201.1, the mediation program was designed for the negotiation and settlement of more complicated cases. The district judge or the magistrate judge may refer cases to mediation without the consent of the parties.[56] Additionally, parties may agree to mediation of their case by consent, and apply to the district judge or the magistrate judge for leave to mediate.[57] In every case, counsel should continuously consider whether the intensive efforts of a trained mediator would aid the prospects for a fair and efficient resolution.

11-3:2 Selection of Mediators and Compensation

The Court has given considerable leeway to the mediators to manage the mediation flexibly and fairly. The *Guidelines for Mediation* give an expansive definition of the mediator's role: "The function of the mediator is to serve as a neutral facilitator of settlement. The mediator is expected to conduct the mediation process in an expeditious manner ... . No specific procedures have been set for the mediator to follow. Instead, the intent of L. Civ. R. 301.1 is for the mediator to assist the parties to reach a negotiated settlement by conducting meetings, defining issues, defusing emotion, and suggesting possible ways to resolve the dispute."[58]

The Chief Judge selects and designates attorneys to sit on the mediation panel based on competence, participation in the training program for

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55. Center for Public Resources/CPR Legal Program, Judges' Deskbook on Court ADR 3 (1993).

56. L. Civ. R. 301.1(d).

57. L. Civ. R. 301.1(d). Mediation by consent is not available, however, for the cases described in Local Rule 72.1(a)(3)(C), which include pro se cases, citizenship cases, and habeas corpus matters. *See* L. Civ. R. 301.1(d).

58. Appendix Q, § II.B.

mediation, and at least five years membership in the bar of the highest court of a state or the District of Columbia.[59] Presently, a cadre of about 75 mediators have received training and been certified, and each typically has 15-30 years of litigation experience.

The mediator receives compensation for services at a rate of $300.00 per hour.[60] The rule requires that the compensation is borne equally by the parties. Any dispute regarding payment of compensation may be directed to the designated compliance judge.[61] Where the parties select a mediator who is not on the panel, the mediator is not subject to the provision for a $300 per hour fee, and the mediator and the parties may fix the amount and terms of compensation by written agreement.[62]

Ethical standards for mediators appear at Local Rule 301.1(g). These standards state the procedures for identifying and resolving conflicts of interest, and for disqualification of mediators, consistent with the ADR Act of 1998.[63]

11-3:3 Mediation Features

How does the mediation work? The main features are:

1. *Promptness*: *stay of proceedings.* Court proceedings are stayed for a period of 90 days from the date of referral to mediation, which may be extended upon joint application of the parties and the mediator.[64] This means that the process cannot continue more than 90 days unless the mediator, joined by all parties, believes that more time would be beneficial, and the judicial officer approves.
2. *Position papers*. Regardless of the complexity of the case, the parties must distill their case into a position paper not exceeding 10 pages. The parties may attach essential documents but not pleadings, unless specifically

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59. L. Civ. R. 301.1(a)(1) & (2).
60. L. Civ. R. 301.1(c), as amended March 1, 2010.
61. L. Civ. R. 301.1(h).
62. Appendix Q, § IV(B).
63. 28 U.S.C. § 653(b). Service as a mediator will generally disqualify the mediator and the mediator's firm from representing any of the parties in subsequent litigation involving both parties. *See, e.g.*, *Poly Software Int'l, Inc. v. Yu Su*, 880 F. Supp. 1487 (D. Utah 1995); *see also McKenzie Constr. v. St. Croix Stor. Corp.*, 961 F. Supp. 857 (D.V.I. 1997).
64. L. Civ. R. 301.1(e)(6).

requested.[65] This will enable the mediator to probe the strengths and weaknesses of parties' legal and factual positions.

3. *Informality*. The mediation consists of meetings with the mediator, jointly or ex parte.[66] This lends flexibility and creativity to the mediation process, centering on negotiations, without a hearing to receive evidence as in arbitration under Local Rule 201.1.

4. *Confidentiality*. Because this is a settlement process, all information presented to the mediator shall be deemed confidential and shall not be disclosed by anyone, including the mediator, without consent.[67] Also, no statements made or documents prepared for mediation shall be disclosed in any subsequent proceeding or be construed as an admission. One exception to confidentiality exists for disclosure of such information as is necessary to advise the court of an apparent failure of a party to participate.

5. *Direct participation*. The parties themselves, as well as the attorneys, have a duty to participate in the mediation and cooperate with the mediator.[68] The attendance of parties themselves (including individuals with settlement authority or specific individuals) is required at mediation sessions unless exempted by the mediator.[69] This contact between the parties and the dispute resolution process brings a directness and focus that speeds resolution.[70]

6. *Flexibility*. The negotiations can address all or part of the issues in litigation, and can in fact extend to other

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65. L. Civ. R. 301.1(e)(2).

66. L. Civ. R. 301.1(e)(5).

67. L. Civ. R. 301.1(e)(5); Appendix Q, § II.B. A breach of mediation confidentiality can result in sanctions. *See, e.g.*, *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778 (S.D.N.Y. 1995) (attorney sanctioned for disclosing a confidential mediation settlement offer). For an excellent discussion of the confidentiality of ADR communications and relevant case law, *see* Federal Judicial Center, Guide to Judicial Management of Cases in ADR 93-104 and 165-80 (2001), and Menkel-Meadow, Love & Schneider, Mediation: Practice, Policy, and Ethics 317-36 (2006).

68. L. Civ. R. 301.1(e)(1).

69. L. Civ. R. 301.1(e)(3).

70. Parties or their representatives must attend and participate in a meaningful manner. Appendix Q, § III. This direct, even intimate, involvement is required for mediation to succeed. *Id.*

> matters bearing on the relationship of the parties. Mediation enables the parties and the mediator to explore questions of law or issues of fact that go beyond the relief sought in the pleadings, which can be especially helpful in repairing business or commercial relationships or in creating a dispute resolution process to enforce settlement obligations.[71]

11-3:4 Selecting the Case for Mediation

Only a small portion of civil cases are selected for mediation in the District of New Jersey. The advantages and benefits of mediation provide a guide for the type of case best suited for mediation.

The advantages of mediation are well-known and include the prospect of avoiding the expense, delay, and risk of adjudication[72] by mutual effort to deal promptly with the heart of the dispute, to temper unrealistic positions, unwarranted assumptions, and the demonization of the adverse party.[73] Other advantages of mediation include "self-determination," which means that "parties retain control over the process and the outcome,"[74] as well as the prospect of better, forward-looking outcomes that balance the parties' needs in a way that a litigated verdict will not.[75] In the larger context of public service, mediation can help build relationships and harmony in the community.[76]

A further advantage may arise from the fact that the mediation program is court-annexed rather than private. Ultimately, the mediators, counsel, and parties are subject to judicial supervision arising within a comprehensive rule-based program providing the attributes of a well-functioning ADR program and ethical requirements for the mediators.[77]

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71. L. Civ. R. Appendix Q, § II.
72. Menkel-Meadow, Love & Schneider, Mediation: Practice, Policy, and Ethics 93-94 (2006).
73. Menkel-Meadow, Love & Schneider, Mediation: Practice, Policy, and Ethics 92-94 (2006).
74. Menkel-Meadow, Love & Schneider, Mediation: Practice, Policy, and Ethics 93-94 (2006).
75. Menkel-Meadow, Love & Schneider, Mediation: Practice, Policy, and Ethics 95 (2006).
76. Menkel-Meadow, Love & Schneider, Mediation: Practice, Policy, and Ethics 95-96 (2006).
77. The Judicial Conference of the United States, after years of study under the Civil Justice Reform Act of 1990, adopted principles defining the essential requirements of federal, court-annexed ADR programs as well as the ethical requirements for mediators, arbitrators, and other neutrals in such programs. *See* "Guidelines for Ensuring Fair and Effective Court-Annexed ADR: Attributes of a Well-Functioning ADR Program and Ethical Principles for ADR Neutrals," reproduced in Federal Judicial Center, Guide to Judicial Management of Cases in ADR 152-64 (2001).

It follows that prime candidates for referral to this mediation program may include cases that will otherwise be expensive and time-consuming to litigate, cases where a range of arguable outcomes is foreseeable, cases where a quick resolution is desired by most or all participants, cases that have collateral impact on other matters or persons, cases in which the parties wish to restore or continue a business or an employment relationship, cases where the parties wish to take control over their dispute resolution process, and cases where the number of parties and issues lends a degree of complexity that can prolong litigation and uncertainty.

An attorney should not be reluctant to suggest the mediation alternative to the magistrate judge or district judge, whether or not the matter seems "complex," if there is a reasonable prospect of successful negotiation and resolution.[78] Since mediation is by definition nonbinding, a party has little to lose, other than the 90-day stay of litigation, by attempting the mediation route, even if it is not initially successful.

11-3:5 Preparing for Mediation

The attorney must prepare for mediation in a different manner than preparing for trial. The problem-solving aspect of mediation is meant to overcome barriers of the adversarial process and it demands different skills in the advocate.

Part of this calculus of success in mediation appears to depend upon the negotiator's attitude toward problem-solving. In a ground-breaking study of some 700 lawyers involved in negotiations, the most effective group, as rated by their adversaries, exhibited traits of empathy and creativity; they were more adaptable and flexible than their less effective peers. In addition, they were agreeable, poised and well prepared. These attorneys were described as fair-minded, realistic and astute about the law.[79] The least effective attorneys in negotiation were perceived by adversaries as irritating, headstrong, stubborn, arrogant, and egotistical.[80] Perhaps such personality traits and approaches cannot be learned (or unlearned) for

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78. A party may also move to compel mediation, by requesting the judicial officer to refer the case to mediation under Local Rule 301.1(d). The movant should suggest how mediation may overcome barriers to settlement. *See Wellness Publ'g v. Barefoot,* No. 02-3773*,* 2008 U.S. Dist. LEXIS 1514, at *12-13 (D.N.J. Jan. 9, 2008) (denying motion to compel mediation where two prior settlement attempts were unsuccessful).

79. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 Harv. Negot. L. Rev. 143, 185-86 (2002).

80. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 Harv. Negot. L. Rev. 143, 177 (2002).

mediation, but the mindfulness of the advocate toward these positive and negative influences upon effectiveness may enhance negotiation success.

Another key aspect of preparation lies in preparing the client for effective participation in the mediation. Clients may have questions that only the lawyer can answer. How does the procedure work? What does the mediator do? What proposals should we present? What about confidentiality and trust? Additionally, the client can help prepare the attorney by clarifying the interests that may be best served by mediation. The issues should be fully explored well in advance of the mediation session, to make the process as meaningful and successful as possible.[81]

11-3:6 Compliance Judge for Mediation

The mediation program is supervised by a compliance judge who is responsible, pursuant to Local Rule 301.1(b), for administering the program and entertaining procedural or substantive issues arising out of mediation.[82] Magistrate Judge Madeline Cox Arleo has been designated

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81. One noted mediation expert, Professor Lela Love, has summarized the ways in which lawyers can help clients in maximizing the potential in the mediation process, through a list of contributions to this process in the form of an acronym entitled "CALL THE LAW," as follows:

C*ourtesy, cooperation and candor*. The attorney should have a respectful tone and be attentive to the other party as the intended recipient of communication, avoiding threats, insults, and personal attacks.

A*rticulate client's interests, issues and proposals.* Acknowledge interests, perspectives and feelings of the other party. Admit obvious mistakes and apparent weaknesses. Address other side (rather than exclusively addressing mediator).

L*isten to own client and reframe for other side when helpful.* Listen to the other side and reframe for client when helpful.

L*evel with client regarding BATNA ["best alternative to negotiated agreement"], particularly the litigation alternative*. Do the math! How much will litigation really cost in time, money and stress? Use decision tree analysis.

T*ell a compelling, moving story, using simple, clear language*. The client is the best speaker if the client is capable of speaking well. The attorney should encourage and support the client in speaking. Use visual aids (videos, charts) to make the client's story understandable and moving.

H*ighlight common interests*. Most parties share an interest in getting on with their lives, saving the costs of litigation, resolving the matter in a satisfactory way, and feeling respected.

E*licit and offer proposals responsive to interests of both parties*. Be creative and willing to move "outside the box."

L*ink objective criteria to support proposals.*

A*rticulate the strengths of your litigation case.* Acknowledge and analyze how vulnerabilities of each side impact the case.

W*in-win result.* Use the goal of a "win-win" result to satisfy your client's interests, while encouraging the other side to move toward your client.

Lela P. Love, Training Materials (2004), reproduced in Menkel-Meadow, Love & Schneider, Mediation: Practice, Policy, and Ethics at 207 (2006).

82. L. Civ. R. 301.1(b).

as compliance judge in this District. Any such issue, including recusal of a mediator, may be brought to the attention of the compliance judge by the parties or the mediator.[83] The compliance judge will investigate complaints and take appropriate action, upon due notice, under the grievance procedure.[84]

11-4 OTHER ADR OPPORTUNITIES

11-4:1 Generally

Beyond the court-annexed mediation and arbitration programs, the district court encourages parties to propose other forms of alternative dispute resolution appropriate to the case. Such alternative dispute resolution is addressed in section X of the *Guidelines for Arbitration* in Appendix M (Alternative Dispute Resolution), which permits and encourages the parties to choose such other forms as mini-trials or summary jury trials, providing as follows:

> It remains the intent of the Court to encourage parties to choose a particular form of alternative dispute resolution. Parties may agree to participate in the mediation process prescribed in L. Civ. R. 301.1 or may participate in other forms of alternative dispute resolution, such as, by way of example only, mini-trials or summary jury trials. Any such agreement between the parties must, however, be presented to a Judge or Magistrate Judge for approval, who shall consider it with due regard for the calendar and resources of the Court. Should the parties agree on some form of alternative dispute resolution the District Judge may administratively terminate the civil action pending completion of the alternative dispute resolution procedure.

11-4:2 Summary Jury Trial

The summary jury trial takes place in a courtroom setting in which a judicial officer presides over a mock jury. The parties may agree to present the whole case or a single key issue, the resolution of which may lead to overall settlement. Counsel make opening and closing statements. The parties present an abbreviated version of the case, under rules to be agreed

83. Appendix Q, § I.
84. L. Civ. R. 301.1(h).

upon. The judge instructs the jury, which then deliberates and renders a nonbinding mock verdict. The parties are required to attend; counsel are permitted to question jurors after the "verdict" to obtain the jurors' reactions to their presentations. Although not widely used in the District of New Jersey, the summary jury trial can be of great benefit in helping the parties settle a complicated case with a day or two of court time.[85] If the parties do not reach a settlement, the case is scheduled for a plenary trial.

11-4:3 Minitrial

The minitrial is a proceeding that may occur before a judicial officer or before representatives selected by the parties themselves. In the court minitrial, counsel present an abbreviated version of the case to a judicial officer in a manner designed to focus upon the issues in greatest dispute. The hearing is informal with relaxed evidence rules and no live witnesses. The judicial officer renders an advisory verdict after a hearing lasting several hours to a full day. The exercise only makes sense where a lengthy, complex trial is otherwise in store. The parties have the benefit of the judicial officer's advisory decision and attempt to negotiate a settlement. The private minitrial involves the parties' selection of a "neutral" instead of a "judicial" officer. The neutral supervises information exchange and conducts the minitrial, rendering an advisory verdict and, if the parties so request, convening post-minitrial settlement negotiations. The nonbinding minitrial procedures preserve the parties' rights to a full trial if negotiation is unsuccessful.[86]

11-4:4 Settlement Protocol

Finally, the settlement protocol method enables participants in a multi-party complex case to design and implement an "agreement to agree" defining the steps that the participants agree to take in good faith toward a settlement. This method is particularly useful in environmental cases

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85. Further discussion of summary jury trials may be found in Lambros, "The Summary Jury Trial—An Alternative Method of Resolving Disputes," 69 Judicature 286 (1986); Posner, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," 53 U. Chi. Law Rev. 366 (1986); and Center for Public Resources/CPR Legal Program, Judge's Deskbook on Court ADR 19-23 (1993); Federal Judicial Center, Guide to Judicial Management of Cases in ADR 44-45 (2001).

86. Further discussion of the flexible minitrial process appears in Brazil, "A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver and Whether They Threaten Important Values," 1990 U. Chi. Legal F. 303; Hoellering, "The Minitrial," Arb. J., Dec. 1982 at 48; Judge's Deskbook on Court ADR 25, 28 (1993); Federal Judicial Center, Guide to Judicial Management of Cases in ADR 45, 47 (2001).

where the allocation of potential or actual remediation liability among dozens or hundreds of potentially responsible parties must otherwise be adjudicated.[87] The participants' task is to design a credible, fair, and relatively speedy dispute resolution process that is then described in a written "protocol" or "settlement process agreement."

Parties in the litigation—and indeed nonparties whose interests may be affected—then choose whether or not to become "settlement process participants" having the rights and obligations described in the program. The judicial officer may participate in helping the parties formulate the protocol, and in any event the court's approval of the proposed protocol process is necessary to achieve a stay of the litigation pursuant to section X of the *Guidelines for Arbitration* in Appendix M to the Local Rules.

The protocol offers a design for dispute resolution most appropriate to the case. The protocol should clearly address several major elements:[88]

(a) The goals of the process, including interim goals.

(b) The selection of liaison counsel or others to administer the process.

(c) The method for sharing and reimbursing costs of the process among participants.

(d) The duties of participants to disclose information necessary to form a competent factual database.

(e) The retention of neutral experts to evaluate the parties' positions, to assist in allocating prospective liability shares among participants, and to resolve disputes about the completeness of data or other matters.

(f) An integrated timeline for achieving the interim and final goals.

(g) A method for sanctioning participants for failing to participate in good faith.

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87. *See United States v. Kramer*, 19 F. Supp. 2d 273, 278-80 (D.N.J. 1998) (describing settlement protocol process in CERCLA case involving 300 participants); Simandle, *Resolving Multi-Party Hazardous Waste Litigation*, 2 Villanova Env. L.J., 111, 118-37 (1991); Federal Judicial Center, Manual for Complex Litigation, Fourth §§ 22.9, 24.3 at 446-48, 677-88 (2004).

88. *See* Simandle, *Managing the Complex Superfund Cost Recovery Case for Litigation and for Settlement*, in American Bar Association Section of Natural Resources, Energy and Environmental Law, Conference on Environmental Law, Vol. II (Mar. 12, 1994) at Tab. 6; Federal Judicial Center, Manual for Complex Litigation, Fourth § 34.32 at 682-87 (2004).

(h) A method for final acceptance/rejection of the allocated settlement shares in the nonbinding final proposal, or for a presumptively binding final settlement if preferred.

The settlement protocol process, under appropriate judicial supervision, can promote the resolution of cases that may otherwise seem intractable. It can become both expensive and time-consuming unless participants diligently meet their obligations, yet it can enhance the fairness and relative promptness of a final resolution in a manner not likely to be achieved in a megatrial.[89]

89. A settlement protocol process that is robust, intensive, and hard fought can lay the foundation for the court's approval of the resulting settlement. For example, the quality and scope of the settlement process are factors to be considered in determining whether to approve a proposed Superfund settlement under Section 122(g) of CERCLA, 42 U.S.C. § 9722(g), *see United States v. Kramer*, 19 F. Supp. 2d 273, 280-89 (D.N.J. 1998), or whether to approve a proposed class action settlement under Federal Rule 23(e), *see In re Electrical Carbon Products Antitrust Litig.*, 447 F. Supp. 2d 389, 398-404 (D.N.J. 2006).