

# District Court Mediation Programs: A View From the Bench

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The Alternative Dispute Resolution Act of 1998 impelled the district courts to develop and regularize effective alternative dispute resolution (ADR) procedures.<sup>1</sup> The prevalence of court-annexed ADR programs has supplanted, in large measure, the prior informal procedures for ad hoc settlement conferences that are conducted mostly by magistrate judges. The benefits that can be derived from such programs are now viewed as a positive adjunct to the district court's important considerations of open accessibility, transparency, fairness, and impartiality in the administration of justice. Court-annexed mediation programs can also advance the goals of the Federal Rules of Civil Procedure as defined by Rule 1—to secure the just, speedy, and inexpensive determination of every action and proceeding.<sup>2</sup>

The approaches taken by the various district courts regarding court-annexed or court-approved ADR programs have varied over time, no doubt in part as a reflection of local customs and regional needs for different types of programs. Our research into district courts' rules concerning ADR procedures has revealed several patterns. Many courts, including the Southern District of Ohio, rely on a panel of volunteer mediators who are willing to conduct settlement or mediation conferences during established "settlement weeks." Some of these volunteer mediators will also accept referrals outside of the established settlement week programs in exceptional or unusual circumstances.

Some courts have adopted the practice of developing a registry of attorneys who are willing to mediate court-referred cases for a fee. Rules governing the registry in these districts vary in scope and detail, but they typically prescribe certain qualifications for registry appointment such as satisfaction of ADR training requirements or a certain number of years of

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I must gratefully acknowledge the assistance of my career law clerk, Laurie J. Nicholson, and my summer extern, Ndongmo Takougang. They have greatly helped to organize my thoughts on this issue in what, I hope, is a helpful article for my colleagues on the bench and the scholars who may have some interest in the actual application of their myriad approaches to dispute resolution.

<sup>1</sup> Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (1998).

<sup>2</sup> FED. R. CIV. P. 1.

legal practice. A few districts have established ADR committees, which may work with county or state bar associations to generate a registry of qualified neutrals. Some courts require mediator fee schedules to be filed with the court's registry, and some expressly provide for court review of the reasonableness of any fee charged to a litigant. Fees charged by these mediators are typically shared equally among the parties, although exceptions to payment may be made for parties demonstrating some financial need.

The Southern District of Ohio's traditional ADR system is described in Local Rule 16.3. A judge may refer any civil case (with a few standard exceptions such as Social Security appeals) for a mediation session or settlement week conference.<sup>3</sup> The court maintains a roster of experienced attorneys who are willing to serve as volunteer neutrals under the direction of the ADR coordinator. In the Southern District, the coordinator is typically a Magistrate Judge appointed by the Chief Judge.<sup>4</sup> A judge may assign a case to another type of ADR process only with the consent of all parties.<sup>5</sup> Extensive confidentiality rules operate to protect communications and statements made during the mediation process.<sup>6</sup>

In 2007, the judges of the Southern District decided to expand the availability of mediation services in our district by hiring a full-time, professional staff mediator.<sup>7</sup> The same open referral procedure in place for our volunteer mediators applies to our staff mediator, and the same extensive confidentiality rules also apply. Information about the court's mediation service and process, including the assurance of confidentiality, is posted on the court's public website.<sup>8</sup>

We also realized the importance of substantively evaluating the services being provided by our staff mediator, as simple statistics on numbers of settlements reached are unsatisfactory.<sup>9</sup> To that end, a working group

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<sup>3</sup> S. D. OHIO CIV. R. 16.3(a)–(b).

<sup>4</sup> S. D. OHIO CIV. R. 16.3(d).

<sup>5</sup> S. D. OHIO CIV. R. 16.3(a)(1).

<sup>6</sup> S. D. OHIO CIV. R. 16.3(c).

<sup>7</sup> See, United States District Court—Southern District of Ohio, <http://www.ohsd.uscourts.gov/mediation.html> (last visited Mar. 6, 2011).

<sup>8</sup> United States District Court—Southern District of Ohio, <http://www.ohsd.uscourts.gov> (last visited Mar. 6, 2011).

<sup>9</sup> Indeed, Magistrate Judge Wayne Brazil has said on this subject:

[T]hose who would insist on using only efficiency criteria to assess the value of ADR programs jeopardize the courts' most precious and only necessary assets: public confidence in the integrity of the processes the courts

(including the author, the district court mediator, and the Sixth Circuit's chief mediator) developed a survey that was distributed to attorneys who had utilized the services of the court's mediator since the inception of the service.<sup>10</sup> The survey generally asked attorneys to compare and evaluate, on the basis of several different factors, the mediation or settlement process as conducted by judges (assigned to the case, non-assigned) or magistrates, the court's mediator, the court's volunteer mediators, and privately-retained mediators. The results of that survey are thoroughly presented and analyzed in the article by Professor Wissler later in this publication, and I will not attempt to review them in any detail. The results of the survey did, however, confirm several of my own beliefs and expectations concerning the strengths and weaknesses of the available settlement options.

Overall, the court staff mediator achieved a higher satisfaction rating than any of the other alternatives that were surveyed. The court mediator also received the largest proportion of first-place overall rankings among the survey respondents. This level of satisfaction was achieved after the Southern District Court's mediation office had been operating for less than two, and the results confirmed my belief in the benefits of this service. I am confident that satisfaction levels will increase as more attorneys and litigants become familiar with the mediation service and the benefits it provides.

It was also very gratifying to see that lawyers responding to the survey believed court staff mediators were more likely to leave their clients feeling better served than they would feel in private mediation, regardless of the outcome of the process.<sup>11</sup> A primary goal of any court service should be to provide effective, satisfactory procedures for the resolution of disputes. A key feature of our mediation program that may be reflected in that outcome is that the service is provided at no direct cost to any participant.

The reported satisfaction levels were also higher for the staff mediator than for the volunteer mediators. Professor Wissler notes several factors that may account for that difference, such as the more limited time availability

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sponsor and public faith in the motives that underlie the courts' actions. We must take great care not to make program design decisions that invite parties to infer that the courts care less about doing justice and offering valued service than about looking out for themselves as institutions (e.g., by reducing their workload, or off-loading kinds of cases that are especially taxing or emotionally difficult or that are deemed "unimportant").

Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found A Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 124 (2002).

<sup>10</sup> Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271 (2011).

<sup>11</sup> *Id.*

and resulting level of responsiveness to litigant needs.<sup>12</sup> All of my colleagues and I are deeply grateful for the hard work and assistance willingly provided by our mediation volunteers in our settlement week programs over the years. However, I am aware that settlement weeks are inherently limited by the number of available volunteers that can be matched with appropriate cases. Any such volunteer efforts are balanced by the practical reality that the cadre of experienced litigators who act as our volunteers have their own client responsibilities. In contrast, the court mediator is a full-time position and his time is limited only by the number of referred cases.

In addition, the availability of a court staff mediator avoids ethical concerns that may be implicated when a judge refers parties to a private mediator outside of our traditional settlement week framework. Any dispute resolution tool utilized by the court must conform to our important considerations of open accessibility, transparency of process, fairness, and impartiality in the administration of justice. The paramount importance of impartiality may be reflected by the fact that in the Wissler survey, results demonstrated that assigned judges ranked almost last in the respondents' preferences for settlement or mediation efforts.<sup>13</sup> Other authors have explored in depth the ethical difficulties that can arise when judges conduct settlement conferences or mediation sessions which are ultimately unsuccessful, and then proceed to preside over a jury trial.<sup>14</sup> In my view, the same concern for preserving impartiality can arise, when a judge selects a mediator from an "approved" court list, even if that selection is made on a rotating basis. Even when the mediator is serving for a reduced fee or pro bono on that matter, as some district court rules provide, the referral may create an impression of judicial imprimatur.

Moreover, the creation of an approved list of individual private mediators may be viewed as an affirmation by the court that those individuals have certain, perhaps unstated, qualifications and experience that merit their inclusion on the list. In any mediation program using an approved

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<sup>12</sup> *Id.* at 289.

<sup>13</sup> *Id.* at 299. One of the major benefits of the district court mediator is avoiding the potentially coercive impact of having the assigned district or magistrate judge attempt to mediate the case. While we, as judges, are usually confident in our ability to put aside information and opinions that develop during mediation sessions, the lawyers and litigants may not be so confident that we can remain free of bias. Thus, when lawyers and litigants' participate in settlement discussions with assigned judges they may be reluctant to candidly disclose their positions, fearing judge bias. This may significantly diminish the likelihood of success and diminish parties' overall satisfaction with the process.

<sup>14</sup> See, e.g., Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335.

list, it would seem prudent to regularize and publish the criteria and the methods by which individuals are placed on that list, and the process by which cases are assigned to any listed mediator. It would be important to put a system in place to ensure that the program and the identified mediators are serving litigants in a process that comports with the court's ethical mandates. It may also be difficult to properly evaluate the mediation services provided by those private individuals over time, and to develop objective criteria by which individuals should be removed from the list. Professor Wissler notes in her article that there is a lack of empirical research to date that examines the different models of mediation services, and this might hinder the development of evaluation criteria.<sup>15</sup> In any event, these tasks—developing criteria for appointments, maintaining the registry, and surveying qualitative results—all would require significant time and attention from district court judges and staff.

These concerns seem even more critical when a court-approved roster of mediators are not serving pro bono, but rather are paid by the parties. At a minimum, fee structures and hourly rates should be fully disclosed to the court and the parties in advance. In many cases, litigants may struggle to pay their own lawyer and have difficulty understanding why they are being asked to pay another lawyer (the mediator) to try to settle the dispute that brought them before the court. If litigants are unable to afford the cost of a private mediator, criteria must be developed for excusing participants from paying fees. These processes, such as defining appropriate tests to determine a party's ability to pay, whether each judge retains the flexibility to excuse payment, and procedures to address and resolve any objections to fees, all must be transparent and evenhanded. District court judges and staff would have to expend significant amounts of energy to develop these tasks.

These concerns and constraints do not arise when the judge is able to refer the parties to a no-cost, in-house, experienced mediator. The Southern District's decision to implement its staff mediation program appears to have achieved many of the goals it aimed to reach. Judges are able to refer matters on a case-by-case basis. The availability of the mediator has increased our collective flexibility in responding to requests from attorneys and their clients for mediation, as we are not constrained by periodic settlement week schedules. Nor are we called on to schedule a volunteer mediator to conduct a session outside of a scheduled settlement week. Employing a court staff has made the mediation referral process completely transparent, efficient, inexpensive, and simple for all parties involved.

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<sup>15</sup> *Wissler, supra* note 10 at 4.

