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***819 ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

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In recent years, alternative dispute resolution (ADR) has evolved into a burgeoning legal phenomenon. Federal courts have been part of that evolution and subsequently, the Northern District of Oklahoma has developed its own program in the wake of the federal courts' experimentation with various forms of ADR. This article discusses ADR in federal courts nationwide, as well as the legislation affecting it. The focus of the article is the impact of the ADR Program in the Northern District of Oklahoma over the past decade. The article concludes with a discussion of ethical issues presented by mediation. [FN1]

ADR in the Federal District Courts

The Federal Judicial Center (FJC) reports that the federal district courts are experimenting with mandatory, non-binding court-annexed and have been since 1977. [FN2] As the result of a 1983 amendment to [rule 16 of the Federal Rules of Civil Procedure](#), the rule provides for use of "extrajudicial procedures to resolve disputes." [FN3] Before the amendment, the procedures primarily involved mediation, arbitration, early neutral evaluation, and summary jury trials. Subsequent to the amendment, procedures have grown to include a settlement week and case valuation in some districts. [FN4] Congress passed legislation in 1988 authorizing ten district courts to continue their pilot programs involving mandatory non-binding arbitration. In addition, the legislation authorized an additional ten districts to ***820** implement voluntary programs. [FN5]

In a report to Congress on the implementation of these programs, the FJC recommended that Congress enact legislation authorizing both mandatory and voluntary arbitration in all federal district courts. [FN6] The Civil Justice Reform Act of 1990 (CJRA) provided further impetus for the use of ADR procedures by requiring thirteen district courts to implement ADR procedures and instructing all other district courts to "consider" adopting ADR procedures. [FN7] As of 1996, the FJC reported that most district courts had adopted or established some form of ADR. [FN8]

The 1996 report indicated that mediation was by far the ADR procedure of choice for federal district courts, with more than half of the ninety-four districts offering and/or requiring mediation. A few courts referred mediation to bar groups or private ADR provider organizations. Arbitration was the second most frequently authorized ADR program, with early neutral evaluation, settlement week, and case valuation the least authorized. Summary jury trials were authorized in over half of the district courts but seldom used. At least one-third of the courts designated magistrate judges as the court's primary settlement officers. [FN9] However, most courts' ADR programs relied on non-judicial "neutrals," i.e., attorneys or other professionals trained in ADR techniques, and most courts required parties to pay a fee to the neutral. [FN10]

On October 30, 1998, the federal Alternative Dispute Resolution Act of 1998 (the Act) was enacted. Provisions of the Act were codified at [28 U.S.C. § 651](#) et seq. For the first time, the Act requires all 94 United States District Courts to implement an ADR program. The Act covers a broad range of ADR concerns, including the types of ADR processes available, the qualifications and training of neutrals, and neutral compensation. The ADR processes the courts may offer include “any process or procedure, other than adjudication by a presiding judge, in which a neutral third party participates” to help resolve controverted issues. [\[FN11\]](#) These procedures include arbitration, mediation, mini-trials, early neutral evaluation, or some combination of those for certain civil cases. [\[FN12\]](#) The Act contains substantial rules and guidelines for arbitration practice in the federal courts. [\[FN13\]](#) This Act is an amended version of the 1988 legislation, discussed above, authorizing ten mandatory and ten voluntary arbitration and pilot programs. [\[FN14\]](#) It does not however, outline rules and procedures for the other authorized ADR processes.

The Act provides extensive guidance for some areas of the required ADR ***821** program and leaves other areas up to the courts to craft by local rule. It directs each district court to enact local rules authorizing ADR in all civil actions, including bankruptcy adversary proceedings. The new local rules must encourage and promote the use of ADR. [\[FN15\]](#) Indeed, the local rule of each district court must require litigants in “all civil cases” to consider using ADR. [\[FN16\]](#) The courts, however, may exempt “specific cases or categories of cases where ADR would not be appropriate.” [\[FN17\]](#) If a court requires that the parties submit to ADR in certain cases, it may only impose non-binding procedures such as mediation or early evaluation. [\[FN18\]](#)

Pursuant to the Act, each district court must designate an existing employee or judge knowledgeable in ADR “to implement, administer, oversee and evaluate” the court's ADR program. [\[FN19\]](#) Further, each district court must maintain a panel of neutrals and devise its own procedures and criteria for selecting neutrals. [\[FN20\]](#) Neutrals should be qualified and trained in the appropriate ADR process; disqualification of neutrals from service in ADR proceedings must be addressed by the local rules unless and until federal rules are adopted pursuant to the Rules Enabling Act. [\[FN21\]](#) Absent a federal rule, local rules must also address confidentiality of the ADR process and prohibit disclosure of confidential dispute resolution communication. [\[FN22\]](#) Although the Act provides for payment of arbitrators and neutrals, it appears that courts retain discretion as to whether payment will be made in any given case. [\[FN23\]](#)

As set forth in the house report accompanying the bill, Congress designed the Act “to address the problem of high caseloads burdening the federal courts.” [\[FN24\]](#) Based on a report issued prior to the Act by the Administrative Office (AO) of the United States Courts, Congress was aware that the case load of the federal judiciary had increased in 1997 to “historic levels in nearly every category.” [\[FN25\]](#) The Congressional Budget Office also expected that “expanding the use of ADR processes to all district courts would yield some net savings in the costs of court administration,” but it did not expect such savings to be significant over the next five years. [\[FN26\]](#)

Congress intended the Act to provide the federal courts “with the tools necessary to present quality alternatives to expensive federal litigation.” [\[FN27\]](#) Congress found that ADR provided “a variety of benefits, including greater ***822** satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.” [\[FN28\]](#) The Act requires the courts to examine the effectiveness of the programs that were implemented before the 1998 Act and make such improvements as are consistent with the legislation. [\[FN29\]](#) It also authorizes the FJC and the AO to assist the district courts in the establishment and improvement of ADR programs “by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate.” [\[FN30\]](#)

In response to changes that may have been prompted by the 1998 Act, the FJC is updating its 1996 report

that currently describes the ADR programs in federal courts. [FN31] Although updated descriptions of the courts' ADR procedures are not yet available, it appears that mediation remains the preferred form of ADR. The AO compiled data indicating that, for the 12-month period ending June 30, 2000, a total of 24,013 cases had been referred to ADR in the federal district courts that reported their statistics to the AO. [FN32] Of that number, 13,665 were referred to mediation. The Northern District of Oklahoma had referred 252 for mediation. As discussed below, the Northern District had an active ADR program in place before passage of the 1998 Act; thus, no substantial changes were necessary to bring the district into compliance with the statute.

II. ADR in the Northern District

A. The Program

While the Northern District of Oklahoma was not one of the programs selected by Congress in 1988 or 1990 to implement ADR procedures, magistrate judges in the Northern District began holding settlement conferences in 1986. Mediation is the most commonly used ADR procedure offered by the Court although other ADR methods are available. These alternative methods include summary jury trial, mini-trial, executive summary jury trial (in which chief executive officers of corporate parties participate as part of a three-judge trial panel), and arbitration.

The Northern District's Local Rules, revised in 1988, include a rule specifically governing the Court's ADR program. By 1993, the rule evolved to show that the Northern District had essentially institutionalized its ADR program. In its present form, Local Rule 16.2 authorizes the court to order a settlement conference and to designate a district judge other than the judge assigned to the case, a magistrate judge, or an adjunct settlement judge (ASJ) to preside at the *823 settlement conference. [FN33] Thus, the case simultaneously proceeds along a double track: one for case management and the other for settlement. The settlement track is not to interfere with any scheduling dates set pursuant to a case management order.

Rule 16.2 requires the lead attorney for each party to appear at the settlement conference, and a person or representative with full settlement authority must accompany the attorney. [FN34] Other interested parties such as insurers or indemnitors are also required to attend and are subject to the same provisions of the rule requiring fully authorized representatives. However, governmental entities may, with leave of the settlement judge, proceed with a representative who has limited authority. Rule 16.2 demands a good faith effort by the parties, attorneys, insurers, indemnitors or others, and failure to attend the settlement conference or participate fully may result in the imposition of sanctions. [FN35]

In addition to a good faith effort, the key to success in mediation is candor with the settlement judge. Strict confidentiality is required under Rule 16.2 in order to encourage such candor. The rule specifically directs that

[t]he settlement judge, all counsel and parties, and any other persons attending the settlement conference shall treat as confidential all written and oral communications made in connection with or during any settlement conference. Neither the settlement conference statements nor communications during the conference with the settlement judge may be used by any party in the trial of the case. No communication relating to or occurring at a court-ordered settlement conference may be used in any aspect of any litigation except proceedings to enforce a settlement agreed to the conference. [FN36] Further, adjunct settlement judges may not be called as witnesses in any case, except as requested by a judge of the Northern District. In such case they may not be deposed; instead, they testify as the Court's witnesses. The adjunct settlement judges who are selected by the Court are lawyers who are specially trained by the Court to conduct settlement conferences. Each ASJ has one or more areas of special legal expertise and is assigned only to cases involving those areas of expertise. ASJs commit to conduct a

minimum of six settlement conferences. The Adjunct Settlement Program for civil cases began in 1988 with six ASJs selected from members of the bar and trained by the Court. [FN37] The program has gradually expanded to include 56 ASJs as of February 2001.

When a case is referred to an ASJ, the conference is scheduled as conveniently as possible for the parties and the ASJ. There is usually no charge for the services of an ASJ, but in the discretion of the trial judge, payment of the *824 ASJ may be required if the parties are able to pay. When appropriate, these charges have been equitably apportioned among the parties. Newly-revised Local Rule 16.2 expresses what has been an inherent judicial power, i.e., that any trial judge in his or her discretion may require that the parties pay for a settlement conference in any reasonable manner or amount.

As the table below indicates, 700 settlement conferences have been held in the Northern District within the last three years. Of those, 369 cases settled, reflecting a 52.7 per cent settlement rate. In those cases that did not settle at the settlement conference or shortly thereafter, the settlement conference provided the parties with an enhanced channel of communication and an opportunity to refine and reduce issues, simplify discovery requests, and explore creative solutions. The settlement conferences provide the parties an opportunity to control their own destinies.

SETTLEMENT PROGRAM STATISTICS

Since 1988, ASJs are employed on an ad hoc basis in the United States Bankruptcy Court for the Northern District of Oklahoma. A formal bankruptcy program was initiated in 1998, and there are currently fourteen bankruptcy panel ASJs, including eight who serve on the civil panel. All three magistrate judges in the Northern District and one bankruptcy judge from another district also conduct settlement conferences for the bankruptcy court. Of the fifteen settlement conferences held in 1999, eleven cases settled, reflecting a 73.3% settlement rate. In 2000, of the 27 settlement conferences held, twenty-one settled, reflecting a 77.7% settlement rate. The Bankruptcy Court has a local rule (Bankr. N.D. Okla. LR 9070) which specifically outlines its ADR program similar to local rule 16.3 for civil cases. The settlement process is also similar to that employed in civil cases, as discussed below.

B. The Process [FN38]

The actual process that occurs in a civil case involves eight steps. The first *825 step is initiation of the lawsuit when one party files a complaint. The second step is the case management conference with the district judge. If the parties agree to, or if the judge orders, a settlement conference, the district judge's law clerk or courtroom deputy then generates a referral form and forwards it to the magistrate judge supervising the ASJ program. The program supervisor assigns the settlement conference to a magistrate judge or an ASJ. An assignment of an ASJ will not take place if one of the parties can provide a compelling reason to require assignment to a magistrate judge or if the district judge assigns a magistrate judge.

The magistrate judge who supervises the program selects the ASJ using a number of factors including: availability of the ASJ; rotation of ASJs (given that each has committed to conduct one conference per month); and type of case. The ASJs selection is, in part, due to their expertise. Some ASJs request assignment to only certain types of cases and others request a broader spectrum of cases. Selection of an ASJ for a certain type of case depends on his or her response to a preference form completed at the time of ASJ training.

If the ASJ receives the case assignment, the magistrate judge sends the assigned ASJ an appointment letter along with a copy of the docket sheet. Upon receipt of the appointment letter, the assigned ASJ checks the docket sheet for conflicts of interest, and notifies the magistrate judge's chambers by telephone if a conflict or

the appearance of a conflict exists. If a conflict exists, assignment to another ASJ is made to hear the case. The ASJ receiving the appointment letter also checks his or her calendar for several dates, times and locations for the settlement conference and telephones the contact person referenced in the appointment letter to arrange the setting of the settlement conference. The schedule for settlement conferences normally begins at 9:30 a.m. or 1:30 p.m. and may continue into the evening, if necessary. The conference is conducted at the federal courthouse or in conference rooms at the ASJ's firm. Depending on the number of parties involved in the lawsuit, two or more rooms may be required. A sufficient number of rooms are required to accommodate private caucuses.

After the ASJ responds to the appointment letter, the magistrate judge's office sends counsel of record and the ASJ a Settlement Conference Order. Appended to these materials is a copy of the typical settlement conference order. The Settlement Conference Order requires each party to submit to the ASJ and opposing counsel a settlement conference statement one week before the date of the settlement conference. The settlement conference order limits each statement to five pages. Although the settlement conference statement has no fixed format, it should set forth the high points of the case and the pertinent settlement history.

Similarly, the settlement conference has no mandatory format, but usually includes the sign in, an opening statement by the ASJ, an opening statement by each side, discussion and private caucuses, and a closing. If the settlement conference is held in the federal courthouse, a member of the magistrate judge's staff will sign-in the parties and their attorneys. The parties and their attorneys provide the staff member with their names, addresses, and telephone numbers. The parties also affirm whether they have settlement authority. Finally, they are *826 shown to a conference room.

The ASJ's opening remarks generally lay the foundation for establishing his or her fairness and credibility. They also lay certain ground rules to establish trust and confidence in the procedure, as well as ground rules for the conference. The ASJ explains the purpose of the settlement conference and his or her approach to the settlement conference. After the ASJ has given his or her opening remarks, the settlement conference may include: (1) opening statements by each client's attorney; (2) opening statements by the client; (3) questions posed by the ASJ (4) private caucuses (private meetings) among the ASJ, a client and his or her attorney; (5) private caucus between the ASJ and each of the attorneys without clients; and (6) the ASJ's settlement recommendation.

The ASJ may prefer to begin with opening statements of counsel. He or she may advise counsel that they have a limited amount of time for their opening statements (e.g., 10-15 minutes). ASJs may instruct counsel to outline the strong or weak points of his or her case. The opening statements give clients an opportunity to hear the attorney for the other side, since each client may have only heard his or her own side and believe there is no other side. The opening statements also give clients an opportunity to see the other side. The ASJ may encourage the parties to speak directly to each other.

After the opening statements by counsel, the ASJ may continue the settlement conference with all parties present or may separate the parties and hold private caucuses. The ASJ may probe as to prior settlement efforts. He or she generally attempts to clarify each client's interests, needs, and concerns. The ASJ often discusses the costs that may be associated with winning or losing a case, the timing of a final decision and payment of judgment. In addition, the discussion may focus on the difficulty or ease of proving the claim or defense, insurance, damages sought, potential publicity, legal effect or precedent, trial and jury considerations, and numerous other factors that may affect the outcome of the case. ASJs also endeavor to determine the extent of the parties' emotional involvement in the case and their comfort level with any settlement decision. They also seek to obtain the attorneys' candid evaluations of the case.

The ASJ generally meets privately with each party and counsel, but may meet with a party without counsel present. In these meetings, the ASJ may obtain the client's view and evaluation of the case. He or she may encourage catharsis and allow a party to vent feelings. The ASJ may ask why the lawsuit was filed and pursued, inquire as to what each party needs in the way of settlement, and discuss the problems related to the client's case.

During the settlement conference, the ASJ encourages fair negotiation. In addition to the offers and counteroffers made by the parties, the ASJ may recommend a settlement or a compromise based on his or her view of the merits of the case or the interests and needs of the parties. Reaching settlement may mean that the ASJ must help one of the parties save face. The ASJ can assist the parties in focusing on their interests and needs, prompting realistic offers and counteroffers being presented. He or she can also assist the parties in clarifying *827 their offers and counteroffers, as well as creating innovative settlement solutions (e.g., apologies, bartered settlement, structured settlement, reformation of contract, dismissal).

If an impasse is reached, the ASJ may recommend a settlement for the parties to consider and respond to by a date and time certain. If so, the ASJ instructs the parties that each must call the magistrate judge (or the ASJ) by a specific date (usually from one to ten days from the date of the settlement conference) and report whether they accept or reject the ASJ's settlement recommendation. By using a "blind" call in system, if one of the parties rejects the settlement recommendation, he or she will not know whether the other party has accepted or rejected the recommendation.

If settlement is reached during the settlement conference, the ASJ has one of the parties memorialize the agreement before concluding the settlement conference and all parties sign the memorial. The more detailed the memorial, the less likely it is that disputes will arise when the agreement is being implemented. The exercise of memorializing the agreement may prompt the parties to think of unresolved issues that can be resolved before the settlement conference is concluded. This hand-written document can serve as the foundation for a formal, typed settlement agreement that can be signed by the parties subsequent to the settlement conference, although many settlements can be implemented without a more formal document.

At the conclusion of the settlement conference, the ASJ completes and returns two settlement conference reports to the magistrate judge who supervises the ASJ Program. The first report, the Settlement Conference Report, is filed with the clerk of the court and notifies the district court judge whether the case has settled and, if so, whether a stipulation of dismissal or a journal entry of judgment is in order. The second report, the Settlement Conference Statistical Report, provides the magistrate judge who supervises the ASJ Program with statistical information.

C. Ethical Issues

1. Guidelines in the Northern District [\[FN39\]](#)

As part of its training program for ASJs, the Northern District seeks to inform and prepare ASJs for ethical issues that they may encounter in settlement conferences. The Rules of Professional Conduct, Okla. Stat. tit. 5, cmt. 1, app. 3-A, certainly govern all lawyers licensed to practice in the state of Oklahoma, but certain rules are particularly applicable to mediators. The applicable rules governing client-lawyer relationships include those addressing conflicts of interest (1.7, 1.8, and 1.9) as well as imputed disqualification (1.10) and former judges or arbitrators (1.12). The lawyer's role as counselor applies to settlement conferences where the ASJ may act as advisor (2.1), intermediary (2.3), and *828 evaluator (2.3). A lawyer's role as an advocate in expediting litigation (3.2) and expressing candor toward the tribunal (3.3) may also apply in the mediation context. The ASJ's truthfulness in statements to others (4.1), communication with persons represented by counsel (4.2),

dealings with unrepresented parties (4.3), and respect for the rights of third persons (4.4) involve transactions with persons other than clients and serve important mediation goals. Lawyer-mediators must also be aware of their responsibilities in accepting appointments (6.2), initiating direct contact with prospective clients (7.3), reporting professional misconduct (8.3), and avoiding misconduct themselves (R. 8.4).

The Northern District's Conduct Guidelines for ASJs require, first, that ASJs conduct themselves in a manner consistent with the ADR policies of the Court. These policies include non-coercion and improving public confidence in the civil justice system through an educational ADR process.

A second guideline outlined by the Court is that an ASJ should strictly maintain the confidentiality of statements made or information conveyed in a settlement conference unless an exception applies. An ASJ should maintain confidentiality not only with regard to the outside world, but also between the participants themselves when confidential information is conveyed in private caucuses. Before any information revealed to the ASJ in a private caucus is revealed to any other participant, the ASJ should first ask permission to transmit that information from the person from whom the information was received. If such permission is withheld, the information which was conveyed to the ASJ must be kept confidential and not be revealed to any other participant.

As a matter of policy, there are some very limited exceptions to the veil of confidentiality provided in connection with settlement conferences. These exceptions are:

1. information necessary to enforce the settlement agreement;
2. information that is statutorily mandated to be reported;
3. information that, in the judgment of the ASJ, reveals a danger of serious physical harm either to a party or to a third person;
4. information that the ASJ informs the parties, prior to the settlement conference, will not be protected by the confidentiality order; and
5. information necessary to defend an ASJ from a charge of misconduct.

In the event one of these exceptions apply, the ASJ should initially seek guidance from the magistrate judge who administers the ASJ program, or in his or her absence, from another district or magistrate judge who is not the judge assigned to the case. A third guideline admonishes ASJs to maintain and protect all attorney-client relationships. An ASJ should not do or say anything that would tend to damage any existing attorney-client relationship. Once an ASJ drives a wedge between an attorney and his or her client, no matter how small it is, a second dispute is usually generated. Subsequently, both the attorney and the client will ***829** likely mistrust the settlement conference process. An ASJ should be particularly mindful of this rule when meeting with a client privately outside the presence of the client's lawyer. In such circumstances, if an ASJ cannot be supportive of the attorney's performance in the case, no comment whatsoever should be made reflecting on the attorney.

The fourth guideline reminds ASJs to conduct settlement conferences impartially. ASJs are expected to approach the settlement conference with impartiality. If an ASJ feels any prejudice or predisposition toward a party, recusal is appropriate. Furthermore, an ASJ should meticulously preserve the appearance of impartiality. An ASJ should appreciate that the appearance of impartiality is crucial in making credible evaluations of the parties' positions during the settlement conference and should strive not only to be, but also to appear to be, objective, neutral, reasonable, and fair in facilitating negotiations, making evaluations, and making settlement recommendations.

A fifth guideline is that an ASJ should recuse when there is any colorable conflict of interest which causes the ASJ or any party discomfort. Due to the fact that ASJs are also practicing lawyers, there is a great potential for conflicts of interest. In order to preserve the integrity of the Adjunct Settlement Judge Program and to

enhance public confidence in the integrity of the program, the Court has adopted a low threshold for disqualification of an assigned ASJ. If either the ASJ or any party feels uncomfortable with a particular ASJ's selection and can articulate a colorable reason for such discomfort, the ASJ will be disqualified and the case will be reassigned. The kind of conflicts which arise are generally non-waivable or waivable.

An ASJ must recuse when he or she determines that a conflict enumerated in [28 U.S.C. § 455\(b\)](#) exists. This statute sets out the type of conflicts which would require a federal judge to recuse including:

a. Where the ASJ has a personal bias or prejudice concerning a party or has personal knowledge of disputed evidentiary facts concerning the case; b. Where the ASJ served as a lawyer in the matter in controversy, or a lawyer with whom he or she practices law served as a lawyer concerning the matter, or a lawyer with whom he or she previously practiced law served as a lawyer concerning the matter during the course of their association, or where the ASJ or such associated lawyer have been material witnesses concerning the matter; c. Where the ASJ has served in governmental employment and in such capacity participated as counsel, adviser, or material witness with regard to the case or expressed an opinion concerning the particular case in controversy; d. Where the ASJ knows that he or she, individually or as a fiduciary, or the ASJ's spouse or minor child residing in the ASJ's household, has a financial interest in the subject matter in controversy or in a party in a case, or any other interest that could be substantially affected by the outcome of the case; *830 e. Where the ASJ or the ASJ's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (1) Is a party in the case, or an officer, director, or trustee of a party; (2) Is acting as a lawyer in the case; (3) Is known by the ASJ to have an interest that could be substantially affected by the outcome of the case; (4) Is to the ASJ's knowledge likely to be a material witness in the case. The ASJ must also recuse when he or she currently represents, in some other case, one of the parties who would appear before the ASJ at the settlement conference or if the ASJ is engaged by such a party to perform some other kind of service (e.g., to provide business advice).

Other potential or actual conflicts can be waived if: the ASJ fully discloses the nature of the conflict to all participating parties, all the participating parties waive the conflict and affirmatively state that they are comfortable with the ASJ proceeding, and the ASJ feels he or she can be fair to all participants and is likewise comfortable with proceeding. Some examples of waivable conflicts are:

a. Conflicts set forth in [Title 28 U.S.C. § 455\(a\)](#). [Section 455\(a\)](#) requires a federal judge (and by extension an ASJ) to “[d]isqualify himself [[or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned.” b. Where an ASJ represents a party in another case in which one of the lawyers who would appear before the ASJ at the settlement conference also represents a party. c. One of the parties who appears before the ASJ at the settlement conference where an ASJ previously represented them in another case, or the ASJ has been previously engaged by such a party to perform some other kind of service (e.g., to provide business advice) but is not currently employed by the party. The sixth guideline asks that an ASJ only accept cases in areas where he or she has sufficient substantive expertise to competently evaluate the case. An ASJ is expected to be able to perform both facilitative and evaluative functions in the context of a single settlement conference. In order to be in a position to competently evaluate a case, the ASJ must have considerable training and experience in the area of substantive law involved in the case. An ASJ should carefully contemplate the substantive areas of law in which he or she will take assignments and decline to take cases having to do with a particular legal field unless the ASJ considers himself or herself to have expertise in that field.

A seventh guideline encourages each ASJ to strive to maintain and improve his or her ADR process

skills. An ASJ should endeavor to keep abreast of new ADR techniques and developments and should accept sufficient assignments to develop, maintain, and improve the skills necessary to be an effective settlement judge.

***831** The final guideline is that an ASJ should work to improve the Adjunct Settlement Judge Program. The program relies upon practicing attorneys who are willing to contribute their time on a pro bono basis both to conduct settlement conferences and to assist in the training and mentoring of ASJ candidates. Once an ASJ has developed ADR process expertise due to his or her participation in the program, it is contemplated that such expertise will be shared with fellow ASJs and ASJ candidates so that the overall quality of the program can be consistently improved.

2. Ethical Standards and Model Rules

In recent years, a national effort has been underway to formalize ethical rules for mediators in the wake of various efforts to regulate mediation at the state and federal levels. For example, the American Bar Association, in conjunction with the American Arbitration Association and the Society of Professionals in Dispute Resolution created a set of Model Standards of Conduct for Mediators, and a collaborative effort by Georgetown University Law Center and the CPR Institute for Dispute Resolution produced the Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral (Model Rule), which was submitted to the ABA Ethics 2000 Commission. The ABA is specifically considering the rule for inclusion in the ABA's Model Rules of Professional Conduct for lawyers. [\[FN40\]](#)

The Model Rule includes six sections addressing diligence and competence, confidentiality, impartiality, conflicts of interest, fees, and fairness and integrity of the process. The ABA and the National Conference of Commissioners on Uniform State Laws (NCCUSL) disseminated for review the first proposed draft of the Uniform Mediation Act (UMA) in the summer of 1999. [\[FN41\]](#) The UMA includes a section dedicated to quality of mediation, which requires, among other things, that a mediator disclose information related to the mediator's qualifications or possible conflicts of interest if requested by a disputant or representative of a disputant. Yet, the UMA's focus appears to be on confidentiality. One section addresses protection against compelled disclosure by disputants and mediators and another section addresses prohibition against disclosure by a mediator. The exceptions to disclosure have generated considerable controversy. [\[FN42\]](#) The UMA is scheduled for reconsideration by NCCUSL this summer and by the ABA House of Delegates in February 2002. [\[FN43\]](#)

***832** Interest in model rules or standards for mediators may be generated, in part, by numerous federal court cases addressing ethical dilemmas arising out of mediation programs. In many of these cases, confidentiality is the central issue. [\[FN44\]](#) Others courts wrestle with conflict of interest issues, specifically, whether to disqualify attorneys from representing parties for whom they previously served as mediators. [\[FN45\]](#) Confidentiality and conflicts of interest are by no means the only ADR dilemmas that eventually present themselves for adjudication or the only ethical dilemmas mediators must address, as the proposed model rules reflect. The model rules represent an effort to provide some guidance for mediators nationally, as well as to foster discussion of such dilemmas.

3. Northern District ASJ Viewpoints [\[FN46\]](#)

Adjunct Settlement Judges in the Northern District recently responded to a questionnaire about areas that had presented ethical dilemmas for them during their service as ASJs. In general, most of the ASJs indicated that they rarely face ethical dilemmas as mediators. A few indicated that they had never faced one. Those who have, indicated that when an ethical dilemma arises it often relates to conflicts of interest. However, the conflict

was easily resolved either by immediately declining to serve when presented with a conflict of interest, or by disclosing the conflict and permitting the parties to decide whether they wanted to waive the conflict or proceed with a different ASJ. A few indicated that conflicts of interest often present a dilemma, but the frequency appears to be related to the size of the firm in which the ASJ worked, the experience of the ASJ, or the specialized area of law practiced by the ASJ. Given that a relatively small number of attorneys practice in the Northern District compared to other districts nationally, one would expect conflicts of interest to arise often.

Numerous ASJs also indicated that the ethical dilemma presenting the greater difficulty is competency--not of the ASJ but of the attorneys representing the parties. Although this is not a frequent dilemma, it often means that the ASJ must deal with a related dilemma: correcting errors of law. As one ASJ wrote: "This is difficult. You cannot settle the case if the client has no confidence in the attorney. You also don't represent the interest of the client. I generally do not *833 correct errors of law." Other ASJs attempted to discuss the error with the attorney outside the presence of the client, to discuss the legal issue generally without embarrassing the attorney in front of his or her client, or spend more time with the client discussing the risks, benefits, and relevant factual and legal issues so that an informed settlement decision can be made. A couple of ASJs offered the attorneys the option of rescheduling the settlement conference after they researched the law more closely. A few indicate that they are careful to avoid allowing one side to use the incompetence or error of law by the other side as an excuse to avoid a reasonable settlement or to dictate terms that effectively deprive the other side of negotiated settlement benefits.

Another ASJ as concerned with attorneys who "stiff-arm" the process and refuse to act in their clients' best interests, which, in his opinion, would be to proceed in good faith with the settlement conference procedure. He remarked, "Even though this conduct may be clearly inappropriate from the position or view of the settlement judge, there are plainly limitations with respect to the settlement judge's advice or recommendation to represented parties."

At least one ASJ as concerned about his own competency to preside at a settlement conference because the conference involved an area of law with which he was unfamiliar. He resolved the dilemma by making an effort to educate himself on the issues identified by counsel for the parties. This situation does not arise often because care is taken to ensure that ASJs are not assigned to matters outside their areas of expertise.

One ASJ wrote about a situation where he was concerned about the capacity of a party to accept any settlement because of the party's emotional state. This type of dilemma falls into what some authors have described as "ensuring informed consent" when an ASJ suspects party incapacity. [FN47]

Confidentiality does not often present a dilemma for ASJs in the Northern District, although one ASJ learned during the course of a settlement conference that counsel might be in danger of physical harm. The ASJ obtained permission from the ASJ program administrator, a magistrate judge, to warn counsel. This would seem an easily acceptable exception to confidentiality requirements.

The questionnaire to which the ASJs responded also sought their views on efforts to adopt ethical standards or model rules for mediators. Most were in favor of such standards or rules, but a few commented that none were necessary, given the terms of the settlement conference order or the ethical rules and codes of professional conduct that they, as lawyers, are already obligated to follow. Of the six areas set forth for consideration by the ABA by the CPR-Georgetown Commission on Ethics and Standards in ADR, all areas are considered important except fees. This response probably reflects the fact that ASJs volunteer their time in the Northern District and are not paid unless the matter is approved for fees by the district judge. Several respondents indicated that they considered *834 "fairness and integrity of the process" to encompass the remaining areas: diligence and

competence, confidentiality, impartiality, and conflicts of interest. As one ASJ succinctly wrote: “If the process doesn't uphold the dignity of the judicial system, we have all failed.”

***835 APPENDIX**

[FN1]. Cheryl L. Baber (B.A., 1987, Midwestern State University; M.A., 1989, Graduate Institute of International Studies; J.D., 1993, Columbia University) is a law clerk to the Honorable Claire V. Eagan, a United States Magistrate Judge for the Northern District of Oklahoma and the Administrator of the ADR Program in the Northern District. Ms. Baber was formerly employed by the law firm of Crowe & Dunlevy in Tulsa, Oklahoma, where she specialized in business and commercial litigation.

[FN1]. Adjunct Settlement Judges (ASJs) in the Northern District's program have contributed by submitting information about ethical dilemmas they have faced during their tenures as ASJs.

[FN2]. Barbara S. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* 13 (Federal Judicial Center, 1990) (hereinafter “Ten District Courts”).

[FN3]. *Fed. R. Civ. P. 16(b)(7)*. See Donna Stienstra, *Alternatives to Litigation: Do They Have a Place in the Federal District Courts ?* 3 (Federal Judicial Center, 1995) (hereinafter “Alternatives”).

[FN4]. Elizabeth Plapinger and Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers* 3 (CPR Institute for Dispute Resolution and Federal Judicial Center, 1996) (hereinafter “Sourcebook”).

[FN5]. Alternative Dispute Resolution Act, *28 U.S.C. §§ 651-58* (2000).

[FN6]. *Ten District Courts*, supra note 2, at 11-12; *Alternatives*, supra note 3, at 5.

[FN7]. Civil Justice Reform Act, *28 U.S.C. §§ 471-482* (2000); see *Alternatives*, supra note 3, at 5.

[FN8]. *Sourcebook*, supra note 4, at 3.

[FN9]. *Id.* at 4-6.

[FN10]. *Id.* at 9-10.

[FN11]. *28 U.S.C. § 651(a)*(1998).

[FN12]. *Id.* § 651(a).

[FN13]. See *id.* §§ 654-58.

[FN14]. Judicial Improvements and Access to Justice Act, *Pub.L.No. 100-702, § 901 (a)*, 102 Stat. 4642, 4659-63 (1988) (amended 1993, 1994, 1997) previously codified at *28 U.S.C. § 651-58* (1994).

[FN15]. *28 U.S.C. § 651(b)* (1998).

[FN16]. *Id.* § 652(a).

[FN17]. *Id.* § 652(b).

[FN18]. *Id.* § 652(a).

[FN19]. *Id.* § 651(d).

[FN20]. *Id.* § 652(a).

[FN21]. 28 U.S.C. § 653(b) (1998).

[FN22]. *Id.* § 652(d).

[FN23]. *Id.* § 658.

[FN24]. H.R. Rep. No. 105-487, at 5 (1998).

[FN25]. *Id.*

[FN26]. *Id.* at 6.

[FN27]. *Id.* at 5.

[FN28]. Alternative Dispute Resolution Act of 1998, Pub. L. 105-315, § 2, 112 Stat. 2993.

[FN29]. 28 U.S.C. § 651(c) (1998).

[FN30]. *Id.* § 651(f).

[FN31]. Telephone Interview with Donna Stienstra, Federal Judicial Center (February 15, 2001).

[FN32]. Facsimile from David Williams, Administrative Office of the United States Courts, to Cheryl Baber, (February 6, 2001) (on file with author), entitled ADR Staffing Credit. Since 48 of the 94 districts apparently did not request staffing credit, the number of cases referred to ADR is assumed to be greater than the ADR Staffing Credit report reflects.

[FN33]. N.D. L R 16.216.2(c), as adopted by General Order 01-02 on March 26, 2001.

[FN34]. *Id.* at 16.2(d).

[FN35]. *Id.*

[FN36]. *Id.* at 16.2(i).

[FN37]. Professor Martin A. Frey (now retired) of the University of Tulsa College of Law Center on Dispute Resolution, one of the original six ASJs, assisted then United States Magistrate Judge John Leo Wagner of the Northern District of Oklahoma in the creation, expansion, and success of the adjunct settlement judge program.

[FN38]. The process and ethical guidelines discussed herein are set forth in the Northern District's training manual for ASJs, and are used with the permission of the Northern District. The manual was originally written and compiled by and under the direction of former Magistrate Judge Wagner. It was subsequently revised by Magistrate Judge Eagan and Professor Frey with the assistance of the University of Tulsa College of Law Center on Dispute Resolution.

[FN39]. *Id.*

[FN40]. Duane W. Krohnke, [ADR Ethics Rules to Be Added to Rules of Professional Conduct, 18 Alternatives to High Cost Litig. 108 \(June 2000\)](#); see also Elizabeth Plapinger and Carrie Menkel-Meadow, [ADR Ethics: Model Rules Would Clarify Lawyer Conduct When Serving as a Neutral, Dispute Resolution Magazine 20 \(Summer 1999\)](#).

[FN41]. Bridget Gentman Hoy, [The Draft Uniform Mediation Act in Context: Can It Clear Up the Clutter? 44 St. Louis U. L. J. 1121 \(Summer 2000\)](#); Richard C. Reuben and Nancy H. Rogers, [Major Step Forward: Proposed Uniform Mediation Act Goes Public for Comments, Dispute Resolution Magazine 18 \(1999\)](#).

[FN42]. Telephone Interview with Donna Stienstra, Federal Judicial Center (February 15, 2001).

[FN43]. E-mail from Nancy Rogers, Platt Professor of Law and Vice Provost at The Ohio State University, Reporter for the National Conference of Commissioners on Uniform State Laws Drafting Committee, and the general coordinator of the Mediation Law Project, to Cheryl Baber, (February 12, 2001) (on file with author).

[FN44]. See, e.g., [Sheldone v. Pennsylvania Turnpike Comm., 104 F. Supp. 2d 511 \(2000\)](#); [Cohen v. Empire Blue Cross & Blue Shield, 142 F.3d 116 \(2d Cir. 1998\)](#); [In re: Grand Jury Subpoena Dated December 17, 1996, 148 F.3d 487 \(5th Cir. 1998\)](#), cert. denied sub nom. [Moczygemba v. United States, 526 U.S. 1040 \(1999\)](#); [Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110 \(N.D. Cal. 1999\)](#); [Folb v. Motion Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164 \(C.D. Cal. 1998\)](#), aff'd., [216 F.3d 1082 \(9th Cir. 2000\)](#); [Datapoint Corp. v. Picturatel Corp., No. Civ. A. 3:93-CV-2381, 1998 WL 51356 \(N.D. Tex. Jan. 23, 1998\)](#); [Doe v. State of Nebraska, 971 F. Supp. 1305 \(D. Neb. 1997\)](#); [Bernard v. Galen Group, Inc., 901 F. Supp. 778 \(S.D.N.Y. 1995\)](#).

[FN45]. E.g., [In re County of Los Angeles, 223 F.3d 990 \(9th Cir. 2000\)](#); [McKenzie Constr. v. St. Croix Storage Corp., 961 F. Supp. 857 \(D. Vir. Is. 1997\)](#); [Poly Software Int'l., Inc. v. Su, 880 F. Supp. 1487 \(D. Utah 1995\)](#).

[FN46]. The viewpoints quoted herein are from an informal questionnaire. The respondents were told that their identity would be kept confidential.

[FN47]. Robert A. Baruch Bush, [The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications, 1994 J. Disp. Rel. 1, 20-21 \(1994\)](#).

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