

AN OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES AND THE DISTRICT OF COLUMBIA COURTS ¹

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Summary: I. Recent growth of Alternative Dispute Resolution in the United States; II. Alternative Dispute Resolution Techniques; III. Court-annexed Arbitration; IV. Court-annexed Mediation.

I. RECENT GROWTH OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Alternative dispute resolution («ADR») covers the broad field of alternatives to formal court proceedings as a means of settling disputes. Although such alternatives have been in place in the United States for a long time, interest in and usage of them has grown tremendously in the past several years, as our state and federal courts have become increasingly overburdened and unable to move cases expeditiously to resolution.

More than 18 million civil lawsuits are now filed annually in all our courts, according to some estimates ³. For the year ending 1991, the Administrative Office of the U.S. Courts reported the filing of approximately 208,000 civil cases in the federal district courts alone ⁴. In 1993, it took an average of four years to resolve a civil dispute that goes to trial in the federal court system ⁵.

¹ This article was originally given as a speech to attorneys, law professors, law students, researchers and court personnel, during a United States Information Agency (USA) speaking tour to Mexico City, Guadalajara, Nuevo Laredo, and Tijuana, Mexico, September 26-30, 1994.

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³ Mazadoorian, «*Widespread Disgust with Civil Justice is Boon to ADR*», **Corporate Legal Times**, April, 1994.

⁴ Verkuil, P., D. Gifford, C. Koch, R. Pierce and J. Lubbers, **The Federal Administrative Judiciary**,

⁵ **Primer on Alternative Dispute Resolution for Agency Counsel**, 3 (United States Department of Justice, Executive Office for United States attorneys, Office of Legal Education, December 1993).

As a consequence, alternatives to court resolution of disputes are booming in our country. I became interested and active in the field of alternative dispute resolution because of my own personal involvement as a lawyer conducting labor and employment litigation in the state and federal courts representing individuals, labor unions, and non-profit organizations. My clients found litigation prohibitively expensive. Even the major corporations in our country, with their substantial resources, are becoming increasingly enthusiastic about ADR because of the expense and delay of litigation.

II. ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

The types of ADR most commonly used in the United States are administrative adjudication, arbitration, mini-trials, early neutral evaluation, and mediation. These techniques are on a continuum from the highly formal and costly to the highly informal and inexpensive. Unsurprisingly, there is a close correlation between formality and expense. Administrative adjudication in federal and state agencies, like adjudication in the courts, requires salaried, tenured judges, permanent support staff, court rooms and judges' chambers, court reporters, attorneys, printed transcripts, and time. All of these are expensive.

1. Administrative Adjudication

Since 1946, the Federal Administrative Procedure Act has provided for certain contested disputes before federal agencies to be heard at the trial level by impartial hearing officers who are statutorily protected from political pressures by tenure and other guarantees of independence. Our title is *United States Administrative Law Judge* («ALJs»). The U.S. government has approximately 1200 tenured ALJs such as myself in 31 agencies of the executive branch who are selected on merit on the basis of an extensive examination of their qualifications by the United States Office of Personnel Management.

As of July, 1994, three agencies had the largest numbers of ALJs. There were 956 at Social Security Administration, mostly deciding benefit claims, 71 at the U.S. Department of Labor, deciding benefit claims and labor and employment disputes, and 70 at NLRB deciding labor-management relations disputes. Another five federal agencies each had 10 or more ALJs: Federal Energy Regulatory Commission («FERC»), Mine Safety and Health Administration («MSHA»), Occupational Safety and Health Review Commission («OSHRC»), Department of Interior, Department of Transportation, and the Coast Guard. There were fewer than 10 judges at each of the remaining 23 agencies ⁶. It is estimated that the ALJ caseload is approximately 300,000 cases per year, with 250,000 of those handled by Social Security Administration ⁷.

Federal ALJs are generally referred to as the «Administrative Judiciary» and our proceedings look very much like formal court proceedings. They are formal. We often wear robes. We are addressed as «your honor». We have our own court rooms. We hold public on-the-record hearings in which witnesses give sworn testimony and are cross-examined. Although we are not bound by them, we frequently look to the federal rules of procedure and evidence in structuring the proceedings and receiving evidence. Following the hearing, we issue decisions which include detailed written findings of fact and conclusions of law. Our decisions are subject to review by federal trial and appellate judges in the federal court system.

How do we relieve the load on the federal court system? Because we do so much work on these cases in reaching our decisions, many are never appealed to the courts. If they are appealed, the courts can resolve the underlying disputes much more expeditiously because of the work that we as ALJs have already done. Parties who appeal our decisions to the courts are not entitled to a new trial. Rather, the court works with the factual record already developed by the ALJ rather than providing a new trial. Further, the review undertaken by the courts

⁶ As reported by John Flannery, Director, Office of Administrative Law Judges, United States Office of Personnel Management, to annual convention of Federal Administrative Law Judges Conference, September 13, 1994.

⁷ ACUS report 5, n. 26.

is a limited one—to determine whether there is substantial evidence to support the factual findings and whether the law has been applied correctly. These are major factors in conserving judicial resources ⁸.

Many of our state governments have state administrative law judges who function much like federal ALJs. They are generally appointed pursuant to state administrative procedure Acts. State ALJs decide cases involving such matters as licensure of professionals and other workers such as commercial truck drivers, state workers' compensation, unemployment compensation, discipline of state employees, and state regulation of wages and hours of work.

The problem with the use of administrative litigation procedures is that, although they were originally created to provide a less formal, quicker forum for resolution than the courts, over time they have become almost as formal and time-consuming as court proceedings themselves. As a result, administrative agencies have themselves started instituting alternatives to their procedures for litigating before ALJs. Since August 16, 1993, settlement judges (judges other than those assigned to adjudicate the case) have been available to litigants before the U.S. Department of Labor's Office of Administrative Law Judges for confidential mediation ⁹. The National Labor Relations Board has recently proposed a rule to institute a similar program in its Office of Administrative Law Judges ¹⁰.

2. Arbitration

Arbitration is also a type of adjudication, in which the parties present documentary evidence, testimony, and legal arguments in a hearing before a neutral, third-party fact finder. Arbitration is much more informal than court or administrative litigation and, consequently, is much less expensive. Our legal system supports the use of arbitration

⁸ See generally, Wald, «Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges' Findings and Opinions», 67 *Wash. U.L.O.* 661 (1989).

⁹ 29 U.S.C. 18.9, 58 Fed. Reg. 38498 (July 16, 1983).

¹⁰ 59 Fed. Reg. 46375 (September 8, 1994).

through federal and state statutes, which provide for court enforcement of contractual obligations to arbitrate and of arbitration awards ¹¹. Arbitrators are generally in business for themselves and are paid a flat *per diem* amount for each day they spend hearing and deciding cases. They do not require permanent support staff, courtrooms, and other amenities. They do not wear robes. They are not addressed as «your honor». The space for the hearing may be as informal as a hotel conference room rented for the day. Hearings are not public and are often not transcribed. Formal rules of evidence do not apply. The decision an arbitrator issues may be nothing more detailed than a one sentence finding for or against the plaintiff.

Arbitration of labor disputes has been an established feature of U.S. labor-management relations since the 1930s.

Virtually every union-management collective bargaining agreement in our country provides for binding arbitration of any disputes about the agreement. The parties may agree to choose the arbitrator from a third party roster maintained by an independent source, such as the Federal Mediation and Conciliation Service (FMCS) or the private American Arbitration Association (AAA). Or, they may agree to rotate cases through their own permanent arbitrator or group of arbitrators, selected by mutual consent of the parties. For example, while in private practice, I served as a permanent member of the arbitration panel maintained by the United States Department of Labor for grievances filed by Local 12 of the American Federation of Government Employees (AFGE). Because I made my living as an advocate rather than a neutral, however, I could not be a member of the FMCS or AAA arbitration rosters.

In addition to labor arbitration, commercial arbitration has long been a feature of business relationships in the U.S. Many contracts, including, increasingly, employment contracts, require disputes, which might otherwise go to the courts to be resolved through binding arbitration. In 1991, the U.S. Supreme Court, in the case of *Gilmer v. Interstate/Johnson Lane*

¹¹ Federal Arbitration Act, 9 U.S.C. s1 (1990); See e.g. district of Columbia Uniform Arbitration Act, D.C. Code S16-4301 *et seq.* (1980).

*Corp.*¹², upheld compelled arbitration of a statutory claim of age discrimination —*i.e.* a case which would otherwise have gone into court. The plaintiff had been a manager of financial services for the defendant and, as a condition of his employment, had had to register as a securities representative with the New York Stock Exchange. His registration application required him to agree to arbitrate any employment disputes.

3. Mini-trials

As the name suggests, abbreviated non-binding formal trials of cases may be conducted before judicial officers to facilitate settlement by giving the parties an impartial opinion of the probability of success at the actual trial. If a particular issue is the obstacle to settlement, the trier of fact may receive evidence and rule only on that one issue.

4. Early Neutral Evaluation

In this type of ADR, impartial evaluators, generally attorneys with expertise in the type of case at issue, hold an informal conference to hear both sides and study such documentary evidence as may be necessary to facilitate disposition. The evaluator discusses the strengths and weaknesses of the case and provides the parties with a non-binding opinion of the likelihood of success and the fair settlement value of the case. The parties are given an opportunity to consider settlement both before and after the evaluator renders an opinion.

5. Mediation

Except for mediation, all of these techniques involve a variation of the adjudication process. There are major differences between adjudication and mediation.

¹² __ U.S. __, 111 S. Ct. 1647 (1991).

Adjudication involves public adversary hearings, often on the record, where the parties are advocates slugging it out before a judge. Each side attempts to present its strongest position and minimize its weaknesses. The purpose of the proceeding is to win. During the hearing, the judge has a passive and reactive role. He or she is like a referee at a prize fight, keeping the fighters in the ring together but trying to limit the amount of blood on the floor. After the hearing, the judge publically presents factual findings based on his or her reading of the record, and a judgment as to which party is right and which is wrong. In other words, the judge decides which party wins and which party loses.

Mediation is quite different. The dictionary definition of mediation is to interpose oneself between the parties in order to bring them together. In other words, the mediator is an active participant, rather than a passive director of traffic. The mediator acts as a buffer. Mediators do not adjudicate, they do not make factual findings, they do not decide who is right or wrong or who gets to win or lose. The purpose of mediation, unlike adjudication, is not to come out with a winner and a loser but with a settlement. To arrive at a settlement. To arrive at a settlement, both parties have to feel that they are winners in some respect, *i.e.* that they gain more by settling than by carrying forward with litigation.

Instead of refereeing a fight, as in adjudication, the mediator keeps the parties as far apart as possible to discourage fighting and encourage reconciliation. Generally, the procedure in mediation is that the parties and mediator are in the same room only long enough for each side to acquire a sense of how they relate to each other and the mediator in the mediation setting and for each party to describe briefly its view of the case to the mediator. There is no public hearing. Everything is confidential, in order to encourage the parties to be as candid as possible with the mediator. The mediator cannot discuss the case with anyone else, and he cannot divulge to one side what the other has said without express permission to do so. The parties must agree beforehand that evidence about statements or conduct in mediation proceedings is not admissible in any court proceedings, unless parties agree. Documents disclosed in mediation cannot be used in litigation unless obtained through discovery or subpoena. The mediator

cannot be subpoenaed or called as a witness regarding mediation proceedings in any subsequent court proceeding.

The parties first submit a confidential settlement statement to the mediator which states their views of the issues and, most important, their minimum and maximum figures for settlement.

After the initial group meeting, the mediator takes turns meeting with each side separately and privately. In these meetings, he or she tries to accomplish the following:

1. Find out the parties' real concerns and real bottom line terms for settlement.
2. Help the parties work out what each will actually accept as a monetary settlement.

For example, a plaintiff in an employment discrimination suit alleging national origin based failure to promote him may have brought the suit not because he really feels that he was discriminated against on the basis of his national origin, but because he feels that he was deprived of training which would have made him promotable. He may have filed an employment discrimination case because it is the most readily available vehicle for bringing his concerns to the attention of higher management. As a result, for settlement purposes, the mediator may learn that the plaintiff is less interested in back pay and immediate promotion than in a training program, which will qualify him for the promotion he wants when the position is next vacant. As in early neutral evaluation, the mediator can act as a counter to each side's unrealistic demands by giving a neutral evaluation of how strong or weak their positions will appear to a judge.

The mediator carries offers and suggestions back and forth to each side, attempting to narrow the gap between the money figures for settlement stated by each party and other disputed issues. At the end of the process, the mediator calls together the parties for one last time and, hopefully, finalizes the terms of the agreed-upon settlement and congratulates the parties for

their hard work and successful completion of the process. The parties then incorporate their agreement into a formal agreement. The agreement may be a court document dismissing the case. The agreement becomes enforceable only after both parties have executed it. Until then, either party can withdraw from the process at any time.

Why do we need special mediators? After all, judges themselves have lots of their cases settle before trial and frequently assist in the process by techniques such as holding the parties to tight litigation deadlines so they realize they really will have to go to trial unless they settle. The answer is that judges are assigned to cases for the purpose of adjudicating them, not mediating them, and the lawyers for the parties know that. For mediation to work properly, lawyers for each side have to feel they can be totally candid with the mediator in discussing the strengths and weaknesses of their case in order to reach settlement. That simply will not happen if a lawyer knows that he or she is talking to the same person who may, if settlement attempts fail, have to reach a decision on the basis of those same strengths and weaknesses.

Why offer mediation at all? Why can't the parties settle these cases themselves without the help of a third party neutral such as a mediator? A primary reason is that, particularly in lengthy litigation, so much bad blood may have developed that the parties really cannot talk to each other any more because they are so angry, they can no longer listen to even reasonable proposals by the other side. The mediation process can diffuse some of the anger and help free the parties from untenable positions.

Another important reason is that disputes can be resolved in mediation in a way that adjudication does not permit. This leads to much greater satisfaction of the parties. The following is an example from a mediation I undertook while in private practice. This involved a contract dispute between tenured professors at a university over the failure to promote him from associate to full professor. He had been at the university for 15 years, and had been promoted routinely from assistant to associate after seven years. After the next seven years, when he was eligible for promotion to full professor, he applied to the faculty tenure committee in his department for promotion. They recommended against him. He grieved

the decision to the faculty senate and the university board of trustees, and also filed a lawsuit contending that there had been a breach of his contractual rights under the faculty handbook.

The initial meeting I had with both sides in one of the university's conference rooms was lively, to say the least. The professor kept saying there was nothing to mediate. Rather, he should immediately be retroactively promoted to full professor, should receive a pay increase of approximately \$40,000 a year, and \$250,000 in back pay, *i.e.* the difference between what he had earned as an associate professor and what he should have earned as a full professor.

The university's position was that the refusal to promote him was perfectly justified because he had not produced scholarly works at the level of a full professor, particularly scholarly articles for refereed professional journals. His response was that he had received a student award for being an outstanding teacher so he was doing his job, and that many of the older full professors on the departmental tenure committee who had voted against his promotion had produced less in the way of scholarly works than he had. The university's answer was that that might be true, but they were trying to upgrade the quality of the faculty and had every right to demand more of their younger faculty members.

The professor was a *prima donna*. It was obvious that the university's lawyer couldn't bear him and thought he was a conceited egotist. Because so much posturing was going on, I separated the parties as quickly as possible and started meeting with each side individually. Initially, much of what I did in the individual meetings was listen to the professor ventilate about how badly he had been treated, and to the university's lawyer complain about how difficult the professor was.

In my contacts with the parties over the next several weeks, it developed that the university was willing to settle, but only if they had assurances that the professor would produce scholarly works. They did not want him to «retire on the job» like some of the older faculty members once, they had received the rank of full professor.

Ultimately, we worked out a rather detailed description of the number and kinds of publications the university wanted the professor to produce, and a timetable for producing them. They agreed to his promotion and substantial back pay, to be structured so that he would receive only a small portion of the back pay initially, and additional money after each publication. If he failed to produce as agreed, the rest of the back pay would be withheld.

The end result was that both sides gained. Neither went away empty-handed, as one or the other would have certainly done at the end of a full trial. The professor received his promotion and back pay contingent on his doing what the university wanted him to do –producing scholarly research of benefit to his department and to the university as a whole.

If I had been assigned that case as a judge, instead of a mediator, my authority would have been limited either to ruling against the professor and awarding him nothing, or ruling for him and ordering his promotion and back pay. Even if the evidence was convincing that he had not produced enough in the way of scholarly articles, I would have had no authority to incorporate a production requirement into a remedy. In contrast, in mediation we were able to work out a result where both sides won; the professor received his promotion and back pay, and the university received reasonable assurances of greater scholarly productivity.

III. COURT-ANNEXED ARBITRATION

1. In the United States Generally

We have had court-annexed arbitration in the United States for many years, although most of the growth in these programs occurred in the 1980s. It was introduced in Pennsylvania in 1952. Since then, over half of the states, the District of Columbia, and 10 federal courts have experimented with it.

The authority and rules for court-annexed arbitration programs may derive from state statutes, state supreme court rules, or local procedural rules of court. The rules generally deal with issues such as jurisdictional limits for cases that may be arbitrated, qualifications of arbitrators, selection and compensation of arbitrators, rules for hearings, and time limits on issuance of decisions. They may vary greatly from state to state. For example, Hawaii provides for arbitration of personal injury claims only. New Jersey originally limited arbitration to automobile negligence cases, but later expanded the program to include personal injury claims and, in some counties, contract disputes.

The dollar limits on cases which may be arbitrated also vary. Some jurisdictions will not place cases in arbitration if damages of more than a few thousand dollars are involved. The most common limit is \$50,000.

What all the rules have in common is that they preserve the right to a court trial if either party is dissatisfied with the results of arbitration. Some programs discourage a court trial after arbitration, however, by imposing penalties against the party who asks for the trial. These penalties may include non-refundable fees payable by the party seeking a court trial after arbitration; and fees or deposits which are refundable only if the party seeking the court trial improves the award received in arbitration by a certain minimum percentage ¹³.

2. In the District of Columbia Superior Court

In the District of Columbia, the arbitration program sponsored by the Superior Court is governed by rules enacted by that court. All civil cases are eligible except for cases in small claims court, in landlord-tenant court, class actions, cases in which a party is in prison, or cases seeking only equitable or declaratory relief. An individual judge can assign a

¹³ Keillitz, S. «Court annexed Arbitration, A Working Paper for the National Symposium on Court-Connected Dispute Resolution Research», October 15-16, 1993.

case to arbitration at any time. Arbitration is not binding unless the parties agree to it in writing.

An arbitrator must have the following qualifications. He or she must be:

1. A District of Columbia bar member,
2. Licensed to practice law in any jurisdiction for at least five years, and
3. Have participated as lead attorney in at least three civil trials of over four hours in length in a court of record or before an administrative law judge.

Parties may have single arbitrators or panels of three arbitrators. They must file requests for recusal of an arbitrator within five days of the assignment. Arbitrators have all the powers of a superior court judge assigned to hear a non-jury civil action, except they do not have contempt power. They may recommend contempt to the judge to whom the case has been assigned. They must conduct a hearing within 120 days of assignment as an arbitrator but not earlier than 60 days after assignment. The arbitrator can extend the time for hearing from 120 days to 180 days, but only upon a showing by a party of exceptional circumstances. The arbitrator can only recommend a further extension of the time for hearing to the judge.

Arbitrators can conduct hearings even if one of the parties fails to appear. They can impose liability or determine damages against an absent defendant based upon evidence presented by the plaintiff. If the plaintiff is absent, the arbitrator can grant judgment for the defendant without any presentation of evidence at all, as a sanction because the plaintiff is absent. Formal rules of evidence are looked to as a guide, but are not binding. The primary considerations are relevance, fairness and reliability. Witnesses do not need to appear in person. They may testify by signed and sworn affidavit. The court will not pay for a record of the

hearing. Either party may arrange for taping or transcription, as long as all parties can get copies. If a record is made, the only part which will be admissible as evidence in any subsequent court trial of the case in Superior Court is the sworn testimony of the witnesses.

The arbitrator must file and serve an arbitration award within 15 days of the hearing. Detailed findings of fact and conclusions of law may be provided, but are not required. A party must file objections to the arbitration proceeding or award within 15 days of the filing of the award. The only permissible objections are:

1. The award was procured by corruption, fraud, or other undue means;
2. The arbitrator was partial or corrupt or exceeded his/her powers; or
3. There was prejudicial misconduct.

Unless the parties have agreed to binding arbitration, either party must file any request for a court trial *de novo* within 15 days after the Arbitrator files the arbitration award, or within 15 days of any ruling by the assigned judge on any objections filed by either party to the arbitration award. If the objections are sustained, the award must be vacated and a new arbitrator will be assigned.

Either party can file an application to modify or correct an arbitration award within 60 days of filing. This only applies in the following instances:

1. There is an obvious arithmetical mistake in the amount of the award,
2. There is an obvious mistake in the description of a person, thing or property, referred to in the award,
3. There is a mistake as to the form of the award, or

4. The arbitrator has decided an issue not submitted to arbitration and the award can be corrected without affecting the decision on the merits of the issues that were properly submitted.

In 1993, 397 new cases were referred to arbitration in D.C. Of those, 197 cases were closed before proceeding to arbitration. Of the remaining 200, 172 or 87% were resolved after an arbitration hearing ¹⁴.

3. Under the Sponsorship of the District of Columbia Bar Association

In the United States, lawyers who practice in a jurisdiction must be members of the bar association of that jurisdiction. The bar associations share responsibility for professional disciplinary action with the courts of the jurisdiction, and may have many other functions and programs as well. In the District of Columbia, all attorneys must belong to the D.C. Bar, which has an arbitration service for resolving disputes about lawyers' fees and complaints of lawyer malpractice.

The service is headed by the Attorney-Client Arbitration («ACA») Board, a board composed of seven attorneys who are active members of the D.C. Bar and four lay people. All serve without compensation. They are selected by the Board of Governors of the D.C. Bar. They serve staggered three-year terms and may not serve form more than two terms. Once a year, the ACA board files a report with the D.C. Board of Governors on the kinds of cases handled and other information about the workings of the program. The only paid staff member is the Director of the Board, who has offices in the Bar Association. The Director is responsible for handling all inquiries, assigning arbitrators to hearing panels, maintaining case files, and serving as staff to the ACAB.

¹⁴ Rules of the Civil Arbitration Program, Superior Court of the District of Columbia (1994); Report, **Alternative Dispute Resolution 1994 Program**, Superior Court of the District of Columbia, Multi-Door Dispute Resolution Division.

The Board maintains a roster of volunteer lawyers and non-lawyers who have agreed to serve as arbitrators. It has jurisdiction over fee disputes and claims of malpractice in connection with legal services rendered by an attorney while licensed to practice in the District of Columbia. If the client is not a D.C. resident, at least some of the services must take place in D.C. and the lawyer's office must be located in the Washington, D.C. Metropolitan area, which includes suburban Virginia and Maryland.

Arbitration of fee or legal malpractice disputes which are in court already or which involve services alleged to constitute a crime or a violation of lawyer rules of professional conduct may be postponed by the Board if it determines that proceeding with the arbitration may interfere with, or prejudice a party in other proceedings, or for other goods cause.

A nominal non-refundable filing fee of \$25 is paid by the party who initiates the case. The fee can be waived by the Chair of the Board if the petitioner is indigent. Petitions for arbitration can be submitted by either lawyers or clients, but no arbitrator can proceed without the written consent of both the parties. Petitions can be dismissed only if the ACA Board determines that it does not have jurisdiction, or if the petition is moot or frivolous. First, efforts are made to facilitate amicable resolution. If such efforts fail, both parties then execute a consent to binding arbitration which includes a statement of the amount in dispute. The consent serves as a written limit on the amount that the arbitration panel can award.

The arbitration cases are heard in panels of three, two lawyers and one non-lawyer. One of the lawyers serves as chair of the panel, and makes any procedural rulings necessary at the hearing, such as, for example, on the admissibility of evidence. Arbitrators have the authority to issue subpoenas and administer oaths. Parties are entitled to representation by counsel. They can present witnesses and evidence and cross-examine the other side's witnesses. All proceedings are confidential and no verbatim transcript is made.

Immediately after the conclusion of the hearing, the arbitration panel renders an award, in writing, which is fully binding on the parties

and may be enforced by any court of competent jurisdiction. All that the award states is whether a party is liable and, if so, the monetary amount of liability. The award can include reimbursement of the filing fee ¹⁵.

The ACA Board caseload has been relatively small, approximately 60 to 75 cases per year. There is a proposed rule before the District of Columbia Court of Appeals which would increase their caseload greatly, however. This rule would make arbitration mandatory in fee disputes; only one party would have to request arbitration instead of both sides as presently required ¹⁶.

IV. COURT-ANNEXED MEDIATION

As discussed, mediation is a much different process than adjudication. In mediation, a third party neutral tries to help the parties work out a settlement of their dispute without regard to the merits of their case. In the late 1980s, as civil caseloads rose precipitously, both the local and federal courts in the Washington, D.C. area looked for methods to resolve cases without the time and expense of lengthy court proceedings or other types of adjudication such as arbitration. The local courts began with «settlement weeks» in 1987 through 1989 when all trials stopped and the court was turned over to mediators who mediated between 700 and 900 cases over a five-day period. The mediators were volunteer attorneys such as myself who were willing to be trained in mediation techniques and to mediate cases without compensation other than the appreciation of the court. This was so successful that mediation was instituted on a much wider scale. The federal courts, admiring the success of the local programs, then established their own programs ¹⁷.

¹⁵ **Manual of Arbitrators**, Attorney-Client Arbitration Service, District of Columbia Bar (1991).

¹⁶ Telephone conversation with Mona Savino, Director, D.C. Bar Attorney-Client Arbitration Board, September 22, 1994.

¹⁷ See generally Finkelstein & Stanley, «The Federal Angle», **The Washington Lawyer** 32 (May/June 1992); Summary Report, 1989 Settlement Week, Multi-Door Dispute Resolution Division, Superior Court of the District of Columbia.

1. In the District of Columbia Superior Court

In 1993, the D.C. Superior Court's Dispute Resolution Division was responsible for the successful mediation of about 2,500 cases, including small claims, domestic relations, tax and probate matters, and the range of civil matters from contract disputes to automobile accident negligence claims. Currently, 5,000 civil cases are referred to dispute resolution by the judge during an initial scheduling conference held after the filing. The result has been an increase in the rate of disposition of civil cases in a year or less from 45% to 85%.

Mediators in the Superior Court system are volunteers, who receive a small honorarium for their participation after completing six hours of mediation per year without compensation. They receive intensive training and individual instruction. Each one is periodically evaluated. Currently, mediators in the civil ADR and tax mediation programs must be attorneys, while mediators in the small claims and family and community programs have varied educational and professional backgrounds.

Mediation may be completed in the initial session, generally scheduled for two hours, or multiple sessions may be required. The parties are required to complete confidential settlement statements in advance of the sessions, in which they summarize the issues and their minimum requirements for settlement in terms of money and remedy. At the beginning of the session, the parties are required to sign a statement confirming their understanding that the session is confidential, that all proceedings are privileged and that statements made or documents produced may not be used in court in connection with the case or any other litigation without the consent of the parties. If a settlement is reached, in order to be binding, it must be incorporated in a written settlement agreement filed with and approved by the superior court. If the case does not settle, it proceeds to a pretrial conference and trial¹⁸.

¹⁸ See Report, **Alternative Dispute Resolution 1994 Program**, *supra* at n. 14.

2. In the District of Columbia Federal Courts

The federal District Court has similar procedures for mediation as Superior Court but a much smaller volume of more complicated cases. The success rate is about 55% for cases put into mediation. District court mediators serve without pay and receive intensive training before taking cases. They may work on cases for months before a resolution is achieved. Some of the successes have included an employment discrimination case against PEPCO in which a \$38 million fund was approved for payment of plaintiffs. The case alleged race and sex discrimination in hiring, promotions and other employment actions. Although the case had been pending for several years, it was referred to the mediation program only two weeks before the scheduled trial. Intensive negotiations led to a settlement fund, and changes in company policies regarding hiring, promotion, management-employee communications and other matters. Other cases successfully mediated have included a multimillion dollar legal malpractice suit arising out of an international arbitration involving oil and gas rights in a foreign country.

There is also a mediation program in the United States Court of Appeals for the District of Columbia, which was organized in 1989. Presently, about 25 attorneys mediate in the Appellate mediation program. They are distinguished senior members of the bar, experienced mediators in private practice, and members of law school faculties. The group is chaired by John H. Pickering, of Wilmer, Cutler & Pickering. Their success rate is about 35%. Like the district court program, all proceedings are confidential and are not available to the court. Unless the parties request, the mediation proceedings do not alter the briefing or oral argument schedule ¹⁹.

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¹⁹ See «The Federal Angle», *supra* at n. 17; Handbook, **Dispute Resolution Programs**, United States District Court for the District of Columbia (1994); «Federal Court-Appointed Mediator Helps Settle Record Bias Suit», 4 **World Arbitration & Mediation report** 118 (May, 1993).